



1-1-2007

# The Deregulatory Valence of Justice O'Connor's Federalism

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## Recommended Citation

44 Hous. L. Rev. 507

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# ARTICLE

## THE DEREGULATORY VALENCE OF JUSTICE O'CONNOR'S FEDERALISM

*Bradley W. Joondeph\**

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\* Associate Professor, Santa Clara University School of Law. I owe thanks to Elizabeth Beaumont, June Carbone, David Franklin, Tracey George, Noah Levine, Nancy Maveety, Michelle Oberman, Terri Peretti, Sri Srinivasan, Srija Srinivasan, and Shirley Woodward for their insightful comments at various stages of this Article's development, as well as to the participants in a Santa Clara University School of Law faculty workshop. I also owe thanks to Andrew Martin for help with some statistical issues. This project would not have been possible without the outstanding research assistance of Anthony Basile, Paul Vacquier, and Stuart White, and a summer research grant from Santa Clara University School of Law. In the interests of full disclosure, I should note that I clerked for Justice O'Connor from July 1999 to July 2000. Nothing in this Article addresses subjects remotely confidential.

## I. INTRODUCTION

Few would dispute that the constitutional relationship between the federal government and the states occupied a central place on the Supreme Court's docket during the tenure of William Rehnquist as Chief Justice. In a series of highly publicized decisions, the Rehnquist Court reinvigorated several federalism-based doctrines that constrain the national government, narrowing the breadth of Congress's legislative powers and expanding the states' immunity from federal regulation and from suits for damages. In terms of practical consequences, these decisions may have been more symbolic<sup>1</sup> than revolutionary,<sup>2</sup> but the Court clearly revived the salience of federalism as a principle of constitutional law.

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1. Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1321 (1999) ("Scrutiny of the recent decisions reveals them to be largely symbolic bows to a federalism myth rather than real limitations on federal power."); see also Douglas Laycock, *Protecting Liberty in a Federal System: The US Experience*, in PATTERNS OF REGIONALISM AND FEDERALISM: LESSONS FOR THE UK 119, 140 (Jörg Fedtke & B. S. Markesinis eds., 2005); Ann Althouse, *Inside the Federalism Cases: Concern About the Federal Courts*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 142 (2001) (concluding that the Court's recent pro-federalism decisions have "only modestly trimmed congressional power"); Jim Chen, *Filburn's Forgotten Footnote—Of Farm Team Federalism and Its Fate*, 82 MINN. L. REV. 249, 254 (1997); Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 213–15 (2006); Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 TEX. L. REV. 1551, 1552 (2003) (reviewing JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002)). As Roderick Hills has succinctly summarized it, "Revolution, Schmevolution." Roderick M. Hills, Jr. & Roger Pilon, *Debate Club: The End of States' Rights?*, LEGAL AFF., July 18, 2007, [http://legalaffairs.org/webexclusive/debateclub\\_fedrev0705.msp#Friday](http://legalaffairs.org/webexclusive/debateclub_fedrev0705.msp#Friday). Hills goes on to write that the Rehnquist Court's federalism decisions imposed an "extremely modest brake on the centripetal tendencies of American constitutional law," and that "[f]rom the outset, the Court made it perfectly clear to anyone who bothered to listen that its ambitions for trimming back on national powers were modest and largely apolitical." *Id.*

2. A June 2007 search in the Westlaw Journals and Law Reviews database (JLR) found eighty-five documents using the terms "Rehnquist Court" and "federalism revolution" in the same paragraph. See, e.g., Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 618 (2003) (highlighting Congress's power to abrogate the Eleventh Amendment as a "pillar[] of the federalism revolution of the second Rehnquist Court"); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1690 (2004) (questioning whether the federal judiciary can regulate the structural boundaries between Congress and the states). The *New York Times* has used the term "federalism revolution" over thirty-five times since June 2000. N.Y. TIMES, <http://www.nytimes.com/> (displaying the results of searching "NYT Archive Since 1981" for "federalism revolution") (last visited July 13, 2007). See, e.g., Linda Greenhouse, *Roberts Court Hears Its First Case in Federalism Debate*, N.Y. TIMES, Nov. 10, 2005, at A21 (opining that the Roberts Court is now faced with "the unfinished business of the Rehnquist Court's federalism revolution"); Jeffrey Rosen, *A Majority of One*, N.Y. TIMES MAG., June 3, 2001, at 32, 34 (stating that the "federalism revolution . . . may be the Rehnquist court's most distinctive legacy").

By most accounts, Justice O'Connor played a vital role in this "federalism revival." Drawing on her experience as a state judge and legislator in Arizona,<sup>3</sup> the story goes, O'Connor's decisionmaking emphasized the importance of independent state sovereignty within our constitutional system. She was a consistent member of the five-justice majority that invalidated federal legislation as beyond Congress's commerce power;<sup>4</sup> that circumscribed Congress's authority to enact legislation under Section Five of the Fourteenth Amendment;<sup>5</sup> that struck down federal legislation directing the states to regulate in specific ways;<sup>6</sup> and that narrowed Congress's capacity to expose the states to suits for damages when they violate federal law.<sup>7</sup> And some of O'Connor's more notable opinions—for instance, her majority opinions in *Gregory v. Ashcroft*<sup>8</sup> and *New York v. United States*<sup>9</sup> and her dissents in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>10</sup> and *South Dakota v. Dole*<sup>11</sup>—exalted the importance of preserving the prerogatives of state governments as a counterweight to federal power.

Much of this storyline rings true. But there is more to federalism than the limits on Congress's enumerated powers. The Constitution also places structural limits on *state* power that are designed to protect the interests of the nation as a whole. And in cases implicating these "union-preserving" provisions<sup>12</sup>—

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3. PETER HUBER, SANDRA DAY O'CONNOR 38, 45 (1990).

4. See, e.g., *United States v. Morrison*, 529 U.S. 598, 617–19 (2000); *United States v. Lopez*, 514 U.S. 549, 561–62 (1995).

5. *Morrison*, 529 U.S. at 626–27. But see *City of Boerne v. Flores*, 521 U.S. 507 (1997) (O'Connor, J., dissenting) (noting that Congress's power under the Fourteenth Amendment is limited to enforcement).

6. *Printz v. United States*, 521 U.S. 898, 933 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992).

7. *Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (holding that the ADEA legislation's abrogation of states' sovereign immunity is unconstitutional); *Alden v. Maine*, 527 U.S. 706, 759–60 (1999); *Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996).

8. *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991) (ruling that the Missouri State Constitution did not violate the Federal Age Discrimination in Employment Act).

9. *New York*, 505 U.S. at 176–77 (declaring that the "take title" provision exceeded Congress's power and was inconsistent with the Tenth Amendment).

10. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 588–89 (1985) (O'Connor, J., dissenting) (asserting that state autonomy must be a consideration of the Court when evaluating Congress's power to regulate the states).

11. *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (O'Connor, J., dissenting) (arguing that Congress overreached the boundaries of the Spending Clause by imposing a national minimum drinking age).

12. I borrow the term "union-preserving" from 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-1 (3d ed. 2000).

the Dormant Commerce Clause, the Privileges and Immunities Clause of Article IV, the Import-Export Clause, the doctrine of intergovernmental immunity, and, most significantly, the doctrine of preemption—O'Connor's voting record lacked a similar dedication to protecting the states' policymaking autonomy. In these cases, she essentially voted no differently than the average justice with whom she served.

This Article presents a statistical study of Justice O'Connor's voting record in the full universe of federalism decisions during her tenure on the Court, demonstrating that her approach to federalism was more complicated than most observers have appreciated. The study suggests that O'Connor's reputation as an ardent proponent of state autonomy needs to be tempered, for it is only accurate with respect to disputes about the powers of the national government. If we expand our definition of federalism to include those disputes that involved the Constitution's structural limits on state power, O'Connor's dedication to state autonomy seems relatively tepid. In fact, an equally prominent theme—especially during her last eleven full terms on the Court—is that she tended to disfavor government regulation of any sort, whether it emanated from Congress or the states.

This is not to say that Justice O'Connor's voting behavior was normatively or jurisprudentially inconsistent; there may well have been principled, legal justifications for favoring state policymaking autonomy in one context but not the other. Nor is it to suggest that she consciously used the façade of federalism to accommodate a political preference for less regulation. There is no reason to believe that she did not subscribe to the rationales expressed in her opinions or those that she joined, and, regardless, the nature of human decisionmaking is such that the "true" reasons for a decision are usually unknowable, especially to the decisionmaker herself.<sup>13</sup> Rather, the point is strictly descriptive: in the full universe of decisions involving the constitutional boundaries between federal and state power, O'Connor was comparatively protective of state autonomy only in cases addressing the limits on national authority.

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13. See ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 3 (1999) (describing how people tend to arrive at decisions that they are motivated to reach while being unaware of that motivation's influence); Mahzarin R. Banaji, *Ordinary Prejudice*, 14 *PSYCHOL. SCI. AGENDA* 8, 8 (2001) ("Consciousness . . . permits a view of who we are and what we are capable of that is independent of the knowledge and feelings that may drive beliefs, attitudes, and behavior."); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 *GEO. L.J.* 1, 25–34 (2004) (reviewing literature on how human beings are largely unaware of the many influences on their decisionmaking).

This Article proceeds in four parts. Part II briefly describes the Rehnquist Court's federalism revival and Justice O'Connor's role in that project. Part III explains that, given the breadth of Congress's modern regulatory authority, the latitude afforded state governments in areas of concurrent federal and state jurisdiction may actually be more important to the values of federalism than enforcing the outer limits of congressional power. Thus, to gain a complete understanding of a justice's attitude towards constitutional federalism, we need to review those cases implicating the structural provisions that constrain the states, not just those involving the limits on the national government. Part IV summarizes Justice O'Connor's voting record in the entire universe of federalism cases, so defined, comparing her votes to those of the justices with whom she served. Finally, Part V offers some observations about the study's results. Most interestingly, they show that O'Connor voted to limit regulation as frequently as she voted to enhance state autonomy. In other words, across the full run of federalism cases, O'Connor was as much a proponent of reducing government regulation as she was of enhancing state autonomy.

## II. THE FEDERALISM "REVIVAL"

This much is not news: the Rehnquist Court reshaped the constitutional rules governing the respective roles of the national government and the states in our federal republic.<sup>14</sup> The Court

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14. The thoughtful and perceptive commentary on the Rehnquist Court's federalism jurisprudence is far too voluminous to cite in its entirety. Here is just a sampling: LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002); MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* (2005); Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71 (exploring the absolute lines of impermissible encroachment under the Tenth Amendment, as interpreted by the Rehnquist Court); Vikram David Amar, *The New "New Federalism": The Supreme Court in Hibbs (and Guillen)*, 6 GREEN BAG 349 (2003) (reviewing the Supreme Court's federalism-related decisions of 2003); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001) (criticizing the Supreme Court's interference with vote counting in Florida during the 2000 presidential election); Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127 (2001) (suggesting that the congruence and proportionality test, articulated in *McCulloch v. Maryland*, is unjustified); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001) (surveying decisions of the Rehnquist Court and concluding that recent limitations of Congress's power under the Commerce Clause and Section Five have been based on faulty logic); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002) (discussing the Rehnquist Court's preemption of state law and the tension those decisions have with federalism values); David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92

articulated a new and arguably narrower standard for evaluating whether a federal statute falls within Congress's commerce power.<sup>15</sup> It developed a fairly restrictive understanding of the breadth of Congress's legislative authority under Section Five of the Fourteenth Amendment, requiring that such legislation be

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IOWA L. REV. 41 (2006) (describing the Rehnquist Court's use of facial review rather than as-applied review of the constitutionality of statute); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002) (criticizing the "methodology of the new federalism cases"); Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225 (2001) (describing how the Court's federalism may, inadvertently, have the effect of preventing state agencies from using federal mandates to spend beyond the state agency's appropriation); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006) (explaining that recent Supreme Court decisions preempting state power serve to maintain a uniform national market and prevent one state from exacting costs on neighbor states); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998) (outlining alternative methods of judicial review that better serve the federalism goals of the Rehnquist Court); Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311 (2001) (observing that the Court's Eleventh Amendment jurisprudence may actually constrain state action rather than increase state autonomy); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125 (1995) (discussing whether the shift from a textualist to an originalist account in *Lopez* is justified); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002) (categorizing the Rehnquist Court's jurisprudence as one of decentralized ordering); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, in THE SUPREME COURT REVIEW 343 (Dennis J. Hutchinson, David A. Strauss, & Geoffrey R. Stone eds., 2003); Merrill, *supra* note 2 (indicating how the second Rehnquist Court focused on constitutional federalism, rather than social issues); J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSP. ON POL. 233 (2004) (highlighting the rationale behind the Court's "revival of federalism" and the ensuing controversy); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003) (theorizing that the enforcement model of judicial interpretation unduly limits congressional power to legislate constitutional issues); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 (1995) (agreeing with the Rehnquist Court's result in *Lopez*, but criticizing the opinion as poorly reasoned); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002) (suggesting that the Rehnquist Court's federalism cases have more to do with an "anti-discrimination agenda" than with federalism); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005) (proposing a federalism doctrine that emphasizes interaction between the national and state governments as a superior model to the Rehnquist Court's formal restrictions); Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78 (1995) (interpreting *Term Limits* to be a preview of the Rehnquist Court's formalist approach to federalism); Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477 (2001) (explaining the Rehnquist Court's "federalism offensive"); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1 (2004) (comparing two competing views of federalism on the Rehnquist Court and proposing a "strong autonomy" model that combines elements of both views).

15. See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (invalidating the civil remedy provision of the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549, 561–62 (1995) (striking down the Gun-Free School Zones Act).

"congruent and proportional" to the constitutional violations that Congress seeks to remedy or prevent.<sup>16</sup> It minted the so-called "anticommandeering" principle, which prohibits Congress from directing the states to enact or implement particular regulation.<sup>17</sup> It held that Congress cannot use its Article I powers to enact legislation subjecting the states to suits for damages,<sup>18</sup> overruling the relatively recent precedent of *Pennsylvania v. Union Gas*.<sup>19</sup> Further, the Court extended this principle of sovereign immunity to suits brought in any court, whether state or federal,<sup>20</sup> as well as to adjudicative proceedings before federal administrative agencies.<sup>21</sup> Some have argued that, despite the considerable

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16. See *Morrison*, 529 U.S. at 627; *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (invalidating the Religious Freedom Restoration Act).

17. See *Printz v. United States*, 521 U.S. 898, 926 (1997) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992) (White, J., dissenting) (commenting on the "anticommandeering" principle set forth in the Court's opinion)).

18. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996).

19. *Pennsylvania v. Union Gas*, 491 U.S. 1, 13–14 (1989) (ruling that CERCLA allows the states to be sued in federal courts and noting that Congress can subject the states to liability when legislating pursuant to the Commerce Clause).

20. See *Alden v. Maine*, 527 U.S. 706, 757–60 (1999) (holding that Congress lacked the authority to subject the states to private, unconsenting suits for damages in state court under the Fair Labor Standards Act).

21. See *Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 769 (2002). Perhaps as notably, in fashioning these doctrinal innovations, the Court has asserted itself as the ultimate arbiter of questions concerning the breadth of Congress's power vis-à-vis the states, invalidating national legislation on federalism grounds at a rate unseen in several generations. See, e.g., David Franklin, *Marijuana and Judicial Modesty*, CHI. TRIB., June 9, 2005, at 27 (commenting that, through a series of recent decisions, the Court has reaffirmed its role as the sole interpreter of the Constitution); Jeffrey Rosen, *The End of Deference*, NEW REPUBLIC, Nov. 6, 2000, at 39, 42–43 (reviewing LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000)) (observing that between 1995 and 2000 the Court struck down twenty-five federal laws on grounds of federalism or separation of powers, yet between 1941 and 1995 not a single federal law was found unconstitutional for exceeding Congress's ability to control interstate commerce).

Aside from these constitutional rulings, the Rehnquist Court also invoked federalism principles in several cases of statutory interpretation to limit the encroachment of federal regulation on the states themselves or into areas historically regulated by the states alone. For instance, in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), the Court stated that when "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Id.* at 65 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). It therefore held that neither a state nor its officials, when acting in their official capacities, were "persons" subject to suit under 42 U.S.C. § 1983. *Id.* at 71. Similarly, the Court held in *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765 (2000), that a private individual could not bring a *qui tam* action against a state under the False Claims Act because the states are not "persons" subject to suit under the Act. *Id.* at 787. Alluding to "the doctrine that statutes should be construed so as to avoid difficult constitutional questions," the Court noted that "there is 'a serious doubt'" as to "whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment." *Id.*; see also *Jones v. United States*, 529 U.S. 848, 858–59 (2000) (invoking the same canon of constitutional doubt to



attention these decisions have drawn, their practical effects have actually been quite modest.<sup>22</sup> For instance, the Court's Commerce Clause decisions affect only a small spectrum of activity that Congress might otherwise regulate—activity that is noncommercial, noneconomic, and purely intrastate.<sup>23</sup> Its sovereign immunity decisions leave open a host of alternative means for enforcing federal law against state governments, most notably suits for injunctions under *Ex Parte Young*.<sup>24</sup> Its anticommandeering decisions prohibit a form of legislation that Congress had employed only rarely and for which there are typically a number of effective substitutes.<sup>25</sup> Perhaps most significantly, the Rehnquist Court did nothing to trim Congress's authority under the Spending Clause, leaving Congress the ability to circumvent most of these constraints by enacting conditional spending legislation aimed at the states.<sup>26</sup>

Still, even if the Rehnquist Court's federalism decisions did not constitute a "federalism revolution," they seem to have done something. It is now clear, as it was not before 1995, that there are judicially enforceable limits on Congress's commerce power, particularly with respect to activities that have historically been regulated by the states.<sup>27</sup> Congress's capacity to enact legislation to enforce the proscriptions of the Fourteenth Amendment has been narrowed, such that any legislative effort to enforce a constitutional right or to protect a class of citizens that the Court has not deemed deserving of heightened judicial scrutiny is

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hold that the federal arson statute, 18 U.S.C. § 844(i), does not apply to owner-occupied residences that have not been used for any commercial purpose).

22. See *supra* note 1 and accompanying text (suggesting that, in terms of practical consequences, these decisions may have been more symbolic).

23. See Mark Tushnet, "Meet The New Boss": *The New Judicial Center*, 83 N.C. L. REV. 1205, 1223–26 (2005) (describing congressional power under the Commerce Clause and federalism's limited effect upon it); Althouse, *supra* note 1, at 142 (concluding that the Court has only "modestly trimmed" congressional power).

24. *Ex parte Young*, 209 U.S. 123, 155–56 (1908) (recognizing that a court may enjoin an officer of a state from enforcing an unconstitutional act against an affected party).

25. See Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 483–84 (2003) (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)) (commenting that, even while denying Congress the power to commandeering, the Court has identified many alternatives by which federal interests may be encouraged or regulated).

26. See Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 IND. L.J. 47, 52 (2003).

27. See Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 685–86 (1995) ("Before *Lopez*, many academics and lower court judges speculated that the Commerce Clause no longer imposed any limits on congressional action. The Supreme Court's decision in *Lopez* resoundingly rejected that notion.").

virtually per se invalid.<sup>28</sup> And, because Congress can abrogate the sovereign immunity of states only through legislation enacted under the Reconstruction Amendments,<sup>29</sup> Congress has lost an important means for enforcing federal law against the states. These consequences are not trivial.

Moreover, if the Rehnquist Court did not move the law in revolutionary directions itself, it may nonetheless have laid the groundwork for a future Court to do so. As others have noted, the newly constituted Roberts Court could use the Rehnquist Court's precedents to disrupt some long-settled constitutional understandings.<sup>30</sup> It could hold that landmark environmental legislation, such as the Endangered Species Act or the Clean Water Act, is beyond Congress's commerce power, at least in many of its applications, because the regulated activity is not sufficiently connected to interstate commerce.<sup>31</sup> It could conclude that the anticommandeering decisions have effectively undermined *Garcia* and hold that Congress cannot use its commerce power to regulate certain functions of state governments.<sup>32</sup> It could hold that the disparate impact provisions of Title VII of the Civil Rights Act of 1964 are unconstitutional as applied to state governments, at least with respect to private suits for damages, because they are not "congruent and proportional" to any purported constitutional violations.<sup>33</sup>

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28. See Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, n.92 (2003) (opining that legislation enacted to protect groups not entitled to heightened scrutiny will not likely survive judicial review).

29. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996).

30. See *TUSHNET*, *supra* note 14, at 320–29 (suggesting several areas in which a conservative court might transform the understanding of constitutional law).

31. See, e.g., *GDF Realty Invs., Ltd. v. Norton*, 362 F.3d 286, 287 (5th Cir. 2004) (listing the six circuit judges dissenting from denial of rehearing en banc and suggesting that application of the Endangered Species Act to a species of cave bugs in Texas is unconstitutional); *Rancho Viejo, L.L.C. v. Norton*, 334 F.3d 1158, 1158–59 (D.C. Cir. 2003) (identifying the two judges, including John Roberts, dissenting from denial of rehearing en banc and concluding that application of the Endangered Species Act to arroyo toads in California might be beyond Congress's commerce power); Lee Pollack, *The "New" Commerce Clause: Does Section 9 of the ESA Pass Constitutional Muster After Gonzales v. Raich?*, 15 N.Y.U. ENVTL. L.J. 205, 236–45 (2007) (arguing that "the constitutional fate of [ESA] Section 9 is less certain . . . than other scholars have previously suggested").

32. Cf. John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 825 (2001) (arguing that the Court's federalism decisions have undermined if not overruled *Garcia*, but recognizing the enhanced protection federalism provides for state interests in the context of treaties, as opposed to statutes); see also Neil S. Seigel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1633–34 (2006) (evaluating the impact of the anticommandeering doctrine of federalism values).

33. See *Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ.*, 207 F.3d 945, 952 (7th Cir. 2000) (reserving the question of whether Title VII's disparate impact

Conceivably, though much less likely, it could hold that most federal antidiscrimination legislation is beyond Congress's commerce power because the regulated activity of discrimination—whether based on race, gender, religion, age, or disability—is not “economic” or “commercial” in nature.<sup>34</sup>

Whatever the ultimate significance of the Rehnquist Court's federalism project, the conventional wisdom seems to be that O'Connor played a central role in its development. When O'Connor announced her retirement in July 2005, assessments of her legacy teemed with references to her views on the balance between federal and state power. In its tribute, the *New York Times* editorial page mentioned “her strong support for federalism,” and that “[s]he was fiercely protective of states' rights.”<sup>35</sup> Nina Totenberg observed that O'Connor “became part of a conservative states-rights majority,”<sup>36</sup> while Linda Greenhouse wrote that she had been “a loyal ally” of Rehnquist “in the [C]ourt's continuing reappraisal of the relationship between the states and the federal government.”<sup>37</sup> Academics echoed these views. A.E. Dick Howard said that “it was O'Connor as much as Rehnquist . . . who revived the doctrine of states' rights,”<sup>38</sup> while John Yoo commented that O'Connor's “signature issue, . . . that historians will look back on, is that she really was the person who helped bring about and restore states' rights and more of a balance of powers between the federal government and the state governments.”<sup>39</sup> Stephen Wermeil's view nicely summarizes the prevailing sentiment:

[O'Connor was] strongly motivated by her abiding faith in good government at the state level and her belief that the Framers of the Constitution envisioned a genuine partnership of shared powers between the federal government and the states. Her experience as a state

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standard exceeds Congress's Section Five authority for another day); TUSHNET, *supra* note 14, at 326–27 (stating that a ban on disparate impact discrimination is a form of affirmative action and could be challenged by a conservative Court); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 494–95 (2003).

34. See TUSHNET, *supra* note 14, at 325–27.

35. Editorial, *Justice O'Connor*, N.Y. TIMES, July 2, 2005, at A14.

36. *All Things Considered: O'Connor Steps Down from the Bench* (National Public Radio broadcast July 1, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4726789>.

37. Linda Greenhouse, *Consistently, A Pivotal Role as Groundbreaking Justice Held Balance of Power*, N.Y. TIMES, July 2, 2005, at A1.

38. Michael D. Lemonick & Viveca Novak, *The Power Broker*, TIME, July 11, 2005, at 31, 32.

39. *Newshour with Jim Lehrer: Justice O'Connor's Legacy* (PBS television broadcast July 1, 2005), available at [http://www.pbs.org/newshour/bb/law/july-dec05/oconnor\\_7-1.html](http://www.pbs.org/newshour/bb/law/july-dec05/oconnor_7-1.html).

legislator and judge [gave] her a degree of trust in state government and state courts that [went] well beyond that of her colleagues.<sup>40</sup>

There is more than just a grain of truth in these accounts. Most prominently, O'Connor joined each of the Rehnquist Court's landmark decisions that invalidated acts of Congress on federalism grounds.<sup>41</sup> And, unlike in other areas of the law, O'Connor rarely swung over to the Court's more liberal wing to form a majority coalition.<sup>42</sup> In fact, in the last high-profile federalism decision of her tenure on the Court, *Gonzales v. Raich*,<sup>43</sup> O'Connor authored a strident dissent from the Court's holding that Congress could regulate the possession of home-grown marijuana used exclusively for medicinal purposes. While Justices Scalia and Kennedy sided with the pro-Congress majority, O'Connor argued that such an application of the federal Controlled Substances Act ventured into a sphere reserved exclusively to the states: "If the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers."<sup>44</sup>

Moreover, in addition to authoring some of the more significant opinions in the federalism revival,<sup>45</sup> O'Connor used her opinions to advance fairly deep theoretical justifications for federalism as an abiding constitutional principle—deeper than she tended to develop in other contexts. In her dissent in *FERC*

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40. Stephen J. Wermiel, *O'Connor: A Dual Role—An Introduction*, 13 WOMEN'S RTS. L. REP. 129, 139 (1991); see also Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival after Gonzales v. Raich*, in THE SUPREME COURT REVIEW 1, 3 (Dennis J. Hutchinson, David A. Strauss, & Geoffrey R. Stone eds., 2006) (calling O'Connor "the Court's most consistently pro-federalism member"); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 928 (1994) (calling O'Connor one of "federalism's most enthusiastic proponents"); Rosen, *supra* note 2, at 64 (referring to O'Connor's "attachment to states' rights" and "the federalism revolution that O'Connor has led"); Marci Hamilton, *The Remarkable Legacy of Justice Sandra Day O'Connor*, FINDLAW LEGAL NEWS & COMMENT., July 14, 2005, <http://writ.news.findlaw.com/hamilton/20050714.html> (writing of "Justice O'Connor's belief in the decentralization of power in the constitutional scheme" and "in the importance of preserving a sphere of regulation for the states that may well differ from, and even pose a challenge to, the federal government's larger public policy").

41. See *supra* notes 4–7 and accompanying text.

42. See Whittington, *supra* note 14, at 507. O'Connor's only notable defections from the typical, five-justice pro-state majority in cases involving the federalism-based limits on Congress were in the two Eleventh Amendment decisions of *Tennessee v. Lane*, 541 U.S. 509 (2004), and *Nevada v. Hibbs*, 538 U.S. 721 (2003). See *infra* Part III.B. But see *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004).

43. *Gonzales v. Raich*, 545 U.S. 1, 42 (2005).

44. *Id.* at 47 (O'Connor, J., dissenting).

45. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

*v. Mississippi*, for instance, O'Connor contended that "the 50 States serve as laboratories for the development of new social, economic, and political ideas," citing the examples of women's suffrage, unemployment insurance, minimum wage laws, no-fault auto insurance, and environmental protection.<sup>46</sup> She also argued that "federalism enhances the opportunity of all citizens to participate in representative government," and explained that "[c]itizens . . . cannot learn the lessons of self-government if their local efforts are devoted to reviewing proposals formulated by a faraway national legislature."<sup>47</sup> Finally, she posited that "our federal system provides a salutary check on governmental power," noting that "[u]nless we zealously protect these" divisions of authority, "we risk upsetting the balance of power that buttresses our basic liberties."<sup>48</sup> Or, as she wrote in *Gregory v. Ashcroft*, "[j]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."<sup>49</sup>

In short, there is much to be said for the conventional view of O'Connor as a strong defender of state autonomy. But the decisions on which these perceptions seem to be based all addressed the Constitution's structural limits on the *national* government. From *New York* to *Lopez* to *Garrett* to *Raich*, the issue was whether Congress had exceeded its enumerated powers, and thus impermissibly intruded on state sovereignty.<sup>50</sup> But, as explained further below, federalism is a two-way street. It is as much about the structural limits on the states as those on the national government.<sup>51</sup> Thus, a conception of federalism that

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46. *FERC v. Mississippi*, 456 U.S. 742, 788–89 (1982) (O'Connor, J., dissenting).

47. *Id.* at 789–90.

48. *Id.* at 790.

49. *Gregory*, 501 U.S. at 458.

50. See *Gonzales v. Raich*, 545 U.S. 1, 5 (2005) ("The question presented in this case is whether the power vested in Congress by Article I, § 8, of the Constitution . . . includes the power to prohibit the local cultivation and use of marijuana in compliance with California law."); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001) ("The question, then, is whether Congress acted within its constitutional authority . . ."); *United States v. Lopez*, 514 U.S. 549, 615 (1995) (Breyer, J., dissenting) ("The issue in this case is whether the Commerce Clause authorizes Congress to enact a statute that makes it a crime to possess a gun in, or near, a school."); *New York*, 505 U.S. at 149 ("The constitutional question . . . consists of discerning the proper division of authority between the Federal Government and the States.").

51. See KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 89–90 (15th ed. 2004).

focuses solely on the breadth of Congress's authority is unduly narrow, for it ignores the degree to which states can, or cannot, exercise policymaking autonomy in areas of concurrent federal and state regulatory jurisdiction—which is to say, most areas of modern American life.<sup>52</sup> To gain a more complete picture, we need to widen the lens of federalism, the point to which I now turn.

### III. A BROADER CONCEPTION OF FEDERALISM

In its plainest terms, federalism is a system of governance in which two distinct governments simultaneously exercise sovereignty over the same population and geographic territory. It implies a constitutionalized division of power between these two centers of authority—between the national and state governments—with neither fully answerable to the other, each independent sovereigns in certain respects, yet all part of one nation.<sup>53</sup> For this division of power to work in practice, there must be rules that delineate the respective roles of the national and state governments. These rules need not necessarily be enforced by the courts, nor must they be formally codified. But for a system of government to be accurately characterized as federal, such rules must exist in one form or another.<sup>54</sup>

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52. See generally Fallon, *supra* note 14, at 431–33 (theorizing that the Rehnquist Court's "federalism revival" can be categorized into three prominent lines, each of them focusing on congressional authority rather than protections afforded to the states); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 511–12 (2002) (arguing the importance of ensuring that Congress has indeed focused upon the displacement of state authority before legislating a preemptive federal law); Young, *supra* note 14, at 130–34 ("The first priority of federalism doctrine ought to be limiting the preemptive impact of federal law on state regulation. Stressing preemption shifts the focus firmly back onto what state governments do.").

53. See, e.g., Knapp v. Schweitzer, 357 U.S. 371, 375 (1958) (Frankfurter, J.) ("The essence of a constitutionally formulated federalism is the division of political and legal powers between two systems of government constituting a single Nation.").

54. It is worth noting that federalism has no particular ideological valence. See Cross, *supra* note 1, at 1307–08 (writing that "states' rights arguments are not inherently ideological"). Although it has generally been associated with conservative political causes over the course of American history, that has not always been the case. Indeed, recent issues—such as the medicinal use of marijuana, physician-assisted suicide, and gay marriage, not to mention the presidential election dispute in Florida in 2000—have all involved circumstances in which progressive political causes have embraced the principle of state policymaking autonomy. See, e.g., Stephen Clark, *Progressive Federalism? A Gay Liberationist Perspective*, 66 ALB. L. REV. 719, 723 (2003) (questioning the "soundness of conventionally progressive opposition to federalism and local control"). Nor does the concept of federalism, in itself, dictate a specific balance of power between the national government and the states. Of course, for a system of federalism to be truly federalist, both centers of government must have some independent existence. But beyond that minimum, authentically federal systems can differ quite dramatically in the relative strengths of the national government and the states. See Sunita Parikh & Barry R. Weingast, *A Comparative Theory of Federalism: India*, 83 VA. L. REV. 1593, 1593, 1599–

More to the point, these rules must limit *both* centers of power, not just the national government. While an unconstrained national government could potentially swallow up the independent existence of the states—a point the Rehnquist Court repeatedly emphasized—so, too, might the states act in ways that would effectively destroy the Union.<sup>55</sup> Indeed, problems of this sort under the Articles of Confederation, especially in commercial matters, were largely why the Constitution came into being.<sup>56</sup> A principal defect of the Articles was that they did little to prevent the states from acting in self-interested ways that undermined the interests of the nation as a whole. States imposed various barriers to interstate commerce, such as protective tariffs on goods from other states; they often failed to comply with the Continental Congress's requisitions, the chief mechanism for funding the federal government; they encroached on the federal government's authority, such as by entering into compacts with each other and signing their own treaties with Indian tribes; and they disregarded international agreements that the federal government had reached with other nations.<sup>57</sup> In the words of James Madison, the states had a "centrifugal tendency" to "fly out of their proper orbits and destroy the order [and] harmony of the political system."<sup>58</sup> A chief purpose of the Constitution, then, was to create a "[f]irm Union" that would preserve "the peace and liberty of the States"<sup>59</sup>—to reduce "[t]he interfering and unneighborly regulations of some States" that had

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1606 ("Federalism is not a single type of system, but a family of disparate systems.").

55. This was, of course, the animating idea behind the Court's holding in *McCulloch v. Maryland*, 17 U.S. 316 (1819), that Maryland's tax on the Bank of the United States was unconstitutional. *Id.* at 436. As Chief Justice Marshall wrote, to permit states such a power would be "in its nature incompatible with, and repugnant to, the constitutional laws of the Union." *Id.* at 425.

56. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 466 (1969) ("But once men grasped . . . that reform of the national government was the best means of remedying the evils caused by the state governments, then the revision of the Articles of Confederation assumed an impetus and an importance that it had not had a few years earlier."); see also SULLIVAN & GUNTHER, *supra* note 51, at 123 ("[T]he poor condition of American commerce and the proliferating trade rivalries among the states were the immediate provocations for the calling of the Constitutional Convention.").

57. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 9–10 (5th ed. 2005); see also 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 164 (Max Farrand ed., 1911) [hereinafter *RECORDS OF THE FEDERAL CONVENTION*] ("Experience had evinced a constant tendency in the States to encroach on the federal authority; to violate national Treaties, to infringe the rights & interests of each other . . ."); SULLIVAN & GUNTHER, *supra* note 51, at 123.

58. *RECORDS OF THE FEDERAL CONVENTION*, *supra* note 57, at 165.

59. *THE FEDERALIST* No. 9, at 71 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted).

become "injurious impediments to the intercourse between the different parts of the Confederacy."<sup>60</sup>

Structural limits on the powers of state governments are, thus, a central aspect of American federalism. And those limits, manifested in several distinct constitutional provisions and doctrines, remain critical elements of our governmental structure.<sup>61</sup> The Supremacy Clause, through the doctrine of preemption, dictates that validly enacted federal laws shall negate any state laws with which they conflict.<sup>62</sup> The Dormant Commerce Clause generally nullifies state laws that discriminate against, or place undue burdens on, interstate commerce.<sup>63</sup> The Privileges and Immunities Clause of Article IV forbids states from discriminating against the citizens of other states unless there is a substantial reason for doing so and the discrimination is substantially related to that justification.<sup>64</sup> The doctrine of intergovernmental immunity prohibits states from directly regulating the federal government or enacting laws that discriminate against the federal government's interests.<sup>65</sup> And the Import-Export and Duty of Tonnage Clauses impose specific constraints on the states' taxing powers.<sup>66</sup> Cases involving these union-preserving aspects of federalism tend to receive less attention than those addressing the breadth of Congress's legislative authority. They are often fact specific, turning on the precise scope or purpose of the state or federal laws at issue, and typically do not address broad constitutional principles.<sup>67</sup> Still, the overall trajectory of these decisions is quite important to the federal-state balance—perhaps even more important to the underlying values of federalism than the high-profile cases involving the limits on Congress's enumerated powers, such as *Lopez*, *Printz*, or *Seminole Tribe*.

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60. THE FEDERALIST No. 22, at 144–45 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

61. *TRIBE*, *supra* note 12, at 1021.

62. *See McCulloch v. Maryland*, 17 U.S. 316, 326–27 (1819).

63. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141–42 (1970).

64. *See Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998).

65. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 810–13 (1989). This doctrine, as it affects government employees, is now codified in the Public Salary Tax Act, 4 U.S.C. § 111 (2000). The Supreme Court has held that the scope of the statutory prohibition and the constitutional doctrine of intergovernmental tax immunity are coterminous. *See id.* at 813 ("[W]e conclude that the retention of immunity in § 111 is coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity.").

66. *See Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 264–66 (1935) (discussing "the prohibition against tonnage duties"); *Hamilton Co. v. Massachusetts*, 73 U.S. 632, 639 (1867) (explaining that states' ability to tax imports and exports is restricted to those that are necessary under their inspection laws).

67. *See Massey*, *supra* note 52, at 436.



Consider the most pervasive of these limitations on state power, the doctrine of preemption. So long as Congress acts within its enumerated powers, it can displace state law addressing the same subject, and it can do so in express or implied terms.<sup>68</sup> The fields regulated by the federal government have grown dramatically over the last century, such that federal law now reaches into almost every corner of national life. From crime to occupational safety to environmental protection, federal law governs private conduct that was generally subject only to state control for the nation's first 150 years.<sup>69</sup> Granted, some of the Rehnquist Court's decisions have narrowed the breadth of Congress's legislative powers. But they have done so only at the margins; Congress can still regulate any activity that is economic or commercial in nature, as well as a good deal of activity that is not.<sup>70</sup>

Thus, in a post-New Deal, post-Great Society world, the vast majority of human activity in the United States can be regulated by both the federal government and the states. Consequently, the frequency with which the Supreme Court concludes that federal statutes have displaced state law within this expansive realm of concurrent jurisdiction is critical to the breadth and significance of the states' residuary powers. To cite only a few recent examples, it determines the states' leeway to regulate the practices of health maintenance organizations;<sup>71</sup> whether states can regulate automobile emissions in an effort to reduce

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68. See Bradley W. Joondeph, *Bush v. Gore, Federalism, and the Distrust of Politics*, 62 OHIO ST. L.J. 1781, 1790 (2001) (summarizing the significance of preemption).

69. See *id.* at 1791.

70. As the Court clarified in *Gonzales v. Raich*, 545 U.S. 1 (2005), noneconomic, noncommercial, purely intrastate activities are still subject to federal regulation if Congress rationally "concludes that failure to regulate that class of activity would undercut" a larger, comprehensive scheme that, taken as a whole, plainly regulates interstate commerce. *Id.* at 17–18. Moreover, Congress can cure any constitutionally deficient statute by adding a "jurisdictional element"—language that ensures, on a case-by-case basis, that the regulated activity has a sufficient connection to interstate commerce. See *United States v. Morrison*, 529 U.S. 598, 613 (2000); *United States v. Lopez*, 514 U.S. 549, 561 (1995). In fact, this is precisely what happened in the wake of the Court's decision in *Lopez*. A year later, Congress amended the Gun-Free School Zones Act to add eleven words to 18 U.S.C. § 922(q)(2)(A), defining the relevant offense as the knowing possession of "a firearm that *has moved in or that otherwise affects interstate or foreign commerce* at a place that the individual knows, or has reasonable cause to believe, is a school zone." Pub. L. No. 104–208, 110 Stat. 3009, § 657 (1996) (codified at 18 U.S.C. § 922(q)(2)(A)(2000)) (emphasis added).

71. See *Aetna Health Inc. v. Davila*, 542 U.S. 200, 204 (2004); *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 333–34, (2003); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 359 (2002); see also Theodore W. Ruger, *The United States Supreme Court and Health Law: The Year in Review*, 32 J.L. MED. & ETHICS 528, 528 (2004) (discussing the implications of the *Aetna* decision for the federal regulation of healthcare).

greenhouse gases;<sup>72</sup> whether states can use their investment and procurement practices to express their moral objections to the human rights records of foreign regimes;<sup>73</sup> and the terms on which states can regulate the advertising and labeling of tobacco products to promote the health of their citizens.<sup>74</sup> These questions might be narrow in a constitutional sense, but they are collectively quite important to the states' practical strength as centers of policymaking authority.

The contours of preemption doctrine, as well as the other doctrines surrounding the Constitution's union-preserving federalism provisions, are therefore critical to the values that federalism is supposed to promote—the values that O'Connor often highlighted in her opinions. States can hardly operate as laboratories of democracy, or offer a diverse array of public goods, if their idiosyncratic policy initiatives are routinely displaced by federal law. As Ernest Young explained, “[t]he whole point of preemption is generally to force national uniformity on a particular issue, stifling state-by-state diversity and experimentation.”<sup>75</sup> Preemption also pulls the relevant decisionmaking process further away from the affected citizens, eliminating the solutions reached by state and local communities and placing control of the issue in Washington.<sup>76</sup> Moreover, to the extent vibrant state autonomy operates as an important check on tyranny, preemption undermines this objective by centralizing more control over public policy in one government.<sup>77</sup>

Hence, if we want a complete picture of a justice's approach to federalism, we need to look beyond the decisions addressing the limits of Congress's powers. We should also consider those cases involving the various union-preserving provisions and doctrines that constrain state authority in areas where federal and state regulatory powers overlap.<sup>78</sup> As Justice Breyer has

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72. See Miguel Bustillo, *Stakes High as State Targets Greenhouse Gas From Cars*, L.A. TIMES, Sept. 23, 2004, at A1 (describing a California law that imposes such regulations, and the car industry's plan to enjoin enforcement on the ground that the law is preempted by federal fuel economy standards).

73. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366 (2000); *Bd. of Trs. of Employees' Ret. Sys. of City of Balt. v. Mayor & City Council of Balt.*, 562 A.2d 720, 746 (Md. 1989).

74. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 550 (2001); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530–31 (1992).

75. Young, *supra* note 14, at 130.

76. S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 694 (1991).

77. Young, *supra* note 14, at 132.

78. *Id.* at 131 (“Doctrines limiting federal preemption of state law . . . go straight to the heart of the reasons why we care about federalism in the first place.”).

suggested, these cases arguably present the “true test” of a justice’s commitment to state policymaking autonomy within the modern framework of federalism.<sup>79</sup>

#### IV. JUSTICE O’CONNOR’S VOTING RECORD IN FEDERALISM CASES

##### A. *Study Design*

The purpose of this study is to test the descriptive accuracy of the common assumption that Justice O’Connor tended to favor the interests of the states in cases involving constitutional federalism. My hypothesis is that, although this claim is generally correct as to cases involving the federalism-based limits on the national government, it does not accurately characterize O’Connor’s behavior in cases implicating the structural limits on the states.<sup>80</sup> Because my hypothesis is purely descriptive, testing it only required a statistical summary rather than regression or some other tool designed to derive descriptive or causal inferences.<sup>81</sup>

To test this hypothesis, I created a unique data set.<sup>82</sup> What makes it distinctive is that it includes the full population of federalism decisions handed down by the Supreme Court during Justice O’Connor’s tenure—every case implicating a structural

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79. Justice Breyer’s full statement reads as follows: “[I]n today’s world, filled with legal complexity, the true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress’ commerce power at the edges, or to protect a State’s treasury from a private damages action, but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.” *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 160–61 (2001) (Breyer, J., dissenting) (citations omitted).

80. I am hardly the first person to notice the apparent tension in Justice O’Connor’s approach to the two sides of federalism—that she seemed to care more about state autonomy in cases involving the limits on Congress than she did in cases involving the limits on state governments. Erwin Chemerinsky, Frank Cross, Richard Fallon, Michael Greve, Jonathon Klick, Seth Kreimer, Calvin Massey, Daniel Meltzer, Robert Schapiro, and Ernest Young—to name only a few—have made the same point about the five justices at the heart of the Rehnquist Court’s federalism revival. See Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1313–14 (2004); Cross, *supra* note 1, at 1310–11; Fallon, *supra* note 14, at 432; Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 44 (2006); Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 68 (2001); Massey, *supra* note 52, at 436; Meltzer, *supra* note 14, at 344, n.1; Schapiro, *supra* note 14, at 247–48; Young, *supra* note 14, at 23. To my knowledge, however, no scholar has yet supported this assertion with a comprehensive summary of the justices’ voting records.

81. On the potential value of statistical summaries to empirical legal studies—and the methodological rules governing their validity—see Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 24–29 (2002).

82. The data set and accompanying codebook are freely available for download at <http://claranet.scu.edu/coursepage.asp?cid=1902&page=01>.

provision addressing the constitutional division of authority between the national government and the states.<sup>83</sup> Because my hypothesis is that O'Connor's support for state autonomy varied depending on whether the constitutional provision at issue limited the national government or the states, I coded the decisions as falling into one of these two basic categories.<sup>84</sup> I

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83. The cases included in the study were identified in the following manner:

- First, I conducted searches in Westlaw's Supreme Court database (SCT) searching for references to one of the relevant constitutional provisions or doctrines in the headnotes of opinions. Thus, I ran queries such as "he("eleventh amendment")," "he(preempt!)," and "he ("commerce clause")" for each of the relevant provisions or doctrines.
- Second, I read the text of each opinion generated by these queries to determine whether the Court's *holding*—its ultimate legal judgment in the case—addressed the provision or doctrine queried. In many cases it did not, as the opinion simply referred to the relevant doctrine for other reasons, such as to draw an analogy. Such cases were excluded from the study universe.
- Third, my research assistant conducted searches in the Lexis-Nexis Supreme Court database (U.S. Supreme Court Cases, Lawyers' Edition) searching for references to one of the relevant constitutional provisions or doctrines in the full text of opinions. For instance, he ran the queries "(eleventh OR 11th) w/3 amendment" and "(tenth OR 10th) w/3 amendment."
- Fourth, my research assistant then read these opinions and excluded those whose holdings were clearly unrelated to the queried constitutional provisions or doctrines, erring on the side of inclusion.
- Fifth, after my research assistant compiled lists of decisions involving the various provisions and doctrines, I compared these lists to those that I generated using Westlaw. I read all of the cases on my research assistant's lists that did not appear on my lists.
- Finally, I added to the study universe those cases discovered by my research assistant that I had not found in Westlaw in which the Court's holding directly addressed the queried provision or doctrine.

84. Every case included in the study universe is listed in this Article's appendix, *infra*, separated by the constitutional provision or doctrine at issue and presented in reverse chronological order. Admittedly, this universe excludes a number of decisions in which the justices' views on federalism and state autonomy were relevant to the outcomes. For example, as discussed above, the Court on several occasions has invoked federalism principles in cases of statutory interpretation outside the context of preemption. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), for instance, the Court rejected the Corps's interpretation of the Clean Water Act—which extended the Act's coverage to nonnavigable, intrastate waters—on the ground that it raised "significant constitutional and federalism questions" as to the breadth of Congress's commerce power. *Id.* at 173–74. It is no coincidence that the five justices adopting this construction of the statute were Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas, and that the four dissenters were Justices Stevens, Souter, Ginsburg, and Breyer. The justices' underlying views about the breadth of Congress's commerce power plainly shaped their readings of the statute.

But expanding the scope of the study beyond these parameters would present a number of methodological complications. To state the obvious, virtually every issue of constitutional law has *some* ramifications for the breadth of the states' policymaking autonomy. In the area of criminal procedure, for instance, the dramatic expansion of the

coded the justices' votes as either favoring or disfavoring the outcome that enhanced state autonomy.<sup>85</sup>

Another important characteristic of the study is that it is structured to capture Justice O'Connor's *relative* commitment to state autonomy.<sup>86</sup> Specifically, it compares her votes to those of the other eight justices who sat in precisely the same universe of federalism cases. As a result, all of the potentially relevant independent variables—the various legal texts and precedent, the preferences of other institutional actors, the policy consequences of the different outcomes, the quality of the parties' advocacy, etc.—are held constant. In a sense, the methodology employs a form of matching: given identical case stimuli, how does Justice O'Connor's voting record in federalism cases compare to that of her colleagues? My central premise is that, if O'Connor deserves her reputation, she should have voted for

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rights afforded to criminal defendants as a matter of federal constitutional law over the last fifty years has—for better or worse—substantially curtailed the states' freedom to experiment and resolve these questions as they see fit. See William J. Stuntz, *Police Powers*, NEW REPUBLIC, July 25, 2005, at 20–21. Including every case decided by the Court, however, would lump together decisions in which federalism was the predominant issue with those in which it was only marginally relevant. For instance, federalism seems quite important in some of the Court's habeas corpus decisions, but it is essentially inapposite in others. Compare *Coleman v. Thompson*, 501 U.S. 722, 726 (1991) (beginning Justice O'Connor's famous opinion with the sentence: "This is a case about federalism."), with *Williams v. Taylor*, 529 U.S. 362 (2000) (involving a careful parsing of the various ways in which the Anti-Terrorism and Effective Death Penalty Act amended the standards for habeas relief articulated in 28 U.S.C. § 2254).

A potential solution would be to include those cases in which the federalism issues seemed sufficiently salient, but it would be difficult, or perhaps impossible, to devise selection criteria that would be both objective and meaningful. And absent such objective criteria for defining the universe, the study would violate the critical standard of replication. On the importance of empirical work adhering to the replication standard—ensuring that "another researcher should be able to understand, evaluate, build on, and reproduce the research without any additional information from the author"—see Epstein & King, *supra* note 81, at 38.

85. The complete data set, in Microsoft Excel format, and accompanying codebook are available for download at: <http://claranet.scu.edu/coursepage.asp?cid=1902>.

86. Merely tabulating the percentage of her votes that enhanced state autonomy would tell us precious little. For instance, as the summary in Part III.B shows, O'Connor voted for the outcome enhancing state autonomy in 48% of the cases involving the federalism-based limits on the states. By itself, though, this does not demonstrate whether O'Connor tended to support state autonomy, tended to oppose it, or was ambivalent about it. Needless to say, a host of other variables or influences could have affected her votes in the remaining 52% of the cases, all of which might be fully consistent with a number of different attitudes about state autonomy. More to the point, the raw figure of 48% would mean something quite different depending on the context of her colleagues' behavior. If the other justices who sat in the same cases cast only 20% of their votes in favor of state autonomy, O'Connor would look like a strong ally of the states; but if 70% of her colleagues' votes in those cases favored the states, O'Connor would instead appear quite hostile to state autonomy.

outcomes favoring state autonomy at a higher rate than the average of the other justices voting in the same cases.

The study covers two distinct, overlapping time frames. The first is Justice O'Connor's entire twenty-four-plus terms on the Court, from September 1981 to January 2006.<sup>87</sup> Over this period, comparisons of O'Connor's record to those of other individual justices are fairly complicated, so I instead compared her votes to the cumulative average of the other justices with whom she served. The second time period is October 1994 to July 2005. I include this as a distinct frame of reference because the same nine justices served together for these eleven terms. The fortuity of this long-serving "natural court" allows us to compare O'Connor's federalism record to that of other specific justices in a large universe of decisions.<sup>88</sup>

It is worth noting that, because the study aims to describe the justices' behavior by tallying their votes favoring one outcome or another, it suffers from the same shortcomings as other

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87. Members of the Supreme Court of the United States, <http://www.supremecourtus.gov/about/members.pdf> (last visited Aug. 8, 2007).

88. For every case in the universe, I coded the vote of each justice as either (1) enhancing state autonomy or (2) reducing it. In most instances, this was simple. Nevertheless, three issues are worth mentioning. First, nine cases presented two separate federalism issues that addressed distinct constitutional provisions or doctrines. For example, in *Morrison*, the Court addressed two questions: (a) whether the civil remedy provision of the Violence Against Women Act was within Congress's commerce power, and (b) whether it was valid legislation under Section Five of the Fourteenth Amendment. *United States v. Morrison*, 529 U.S. 598, 619 (2000). In cases like this, I treated the justices' positions on the two issues as two separate votes (and coded each as 1 or 2). Thus, the study includes 246 votes cast by O'Connor, although she participated in only 237 cases. Because the various issues presented in these cases were largely independent, treating them as separate votes seemed the best reflection of the justices' behavior.

Second, some cases presented multiple claims raised under the same constitutional provision or doctrine. In several preemption cases, for example, the Court addressed whether a variety of state law actions were preempted by federal law. In these cases, I treated a justice's split vote—typically, a vote that one claim was preempted while another one was not—as half of a vote for each outcome and coded it as 3. This follows the protocol of another recent empirical study of the Rehnquist Court's voting patterns in preemption cases. See Greve & Klick, *supra* note 80, at 94. This is essentially an arbitrary judgment, but treating each claim within a preemption case as a separate case risked distorting the results through an overpopulation of preemption votes.

Finally, some cases defied simple classification as to the constitutional provision at issue. For instance, in *Board of Trustees v. Garrett*, the Court held that Congress had not validly abrogated the states' sovereign immunity from private suits for damages because Title I of the ADA was not valid Section Five legislation. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001). One might deem this either an Eleventh Amendment decision or a Section Five decision, but including it in both would double-count a single vote. Thus, I simply assigned these cases to one category or the other. In this instance, I classified *Garrett* and similar decisions as Section Five cases. Such judgments about categorization are only matters of form, as the study ultimately combines Eleventh Amendment and Section Five cases under the broader heading of federalism decisions involving the limits on the national government.

studies employing similar vote-counting, outcome-focused methodologies.<sup>89</sup> First, it ignores what the justices have actually written in their opinions. And at the Supreme Court of the United States, the content of the opinions can be more important than whether the judgment under review was affirmed, reversed, or vacated.<sup>90</sup> Second, it places equal weight on each decision, even though some cases are clearly more significant than others.<sup>91</sup>

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89. On the weaknesses inherent in such studies, see Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POLS. 261, 265–67 (2006); Frank B. Cross, Thomas A. Smith, & Antonio Tomarchio, *The Reagan Revolution in the Network of Law* 7 (Soc. Sci. Research Network, Working Paper Series, 2006), available at <http://ssrn.com/abstract=909217>.

90. See Friedman, *supra* note 89, at 266 (discussing the importance of the content of Supreme Court's opinions in evaluating the significance of the Court's work). For example, in the 2004 case of *Tennessee v. Lane*, the Court held that Congress had validly abrogated the states' sovereign immunity in enacting Title II of the Americans with Disabilities Act, at least with respect to its application to state judicial facilities. *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004). The vote was 5–4, and Justice O'Connor joined the majority. *Id.* at 512. I therefore coded her vote as reducing state autonomy. But focusing exclusively on the outcome her vote supported misses much of what happened in *Lane*. The majority substantially limited the scope of its holding, presumably to hold O'Connor's vote, by only addressing Title II's application to state courthouses. *Id.* at 533–34. The Court did not address the much broader question, pressed by the parties, as to whether Title II validly abrogates state immunity when applied to the thousands of other public accommodations covered by the ADA. Thus, while O'Connor sided with Congress, she did so on limited terms, a nuance that binary vote counting necessarily misses.

By presenting O'Connor's voting record in federalism cases *relative* to the justices with whom she served, I have substantially mitigated this problem. Regardless of how the majority framed the question in a given case, the justices voted in ways that expressed their relative preferences. For instance, one might question whether O'Connor's vote in *Lane* was unfavorable to state autonomy in an absolute sense, but her vote clearly was *less* protective of state autonomy than those registered by Rehnquist, Scalia, Kennedy, and Thomas, each of whom dissented. Still, had Justice Stevens, the majority opinion writer, framed the issue more broadly, O'Connor might well have switched sides. See Stephen E. Gottlieb, *Sandra Day O'Connor's Position on Discrimination*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 241, 246 (2004) (positing that expanding the *Lane* holding to include "an aspect of the Equal Protection Clause would have implied a much broader right against the states"). That is, Stevens's discretionary choices about the content of his opinion may well have altered O'Connor's vote. Thus, focusing on the justices' relative voting records does not solve the problem entirely. Some votes to affirm or reverse, as opposed to decisions to merely concur separately, probably depend on the content of the Court's opinions.

91. The Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), holding for the first time in sixty years that Congress exceeded its authority under the Commerce Clause, seems a more important data point in measuring the justices' respective views on federalism than the Court's unanimous decision in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998). In *Deep Sea Research*, the Court held that the Eleventh Amendment does not bar federal jurisdiction over in rem admiralty actions when the state does not possess the property at issue. *Deep Sea Research*, 523 U.S. at 495. Again, one could try to weigh the cases according to some assessment of their relative significance, but doing so would raise the same issue of replication discussed earlier. By not doing so, though, we obviously sacrifice a finer grained appreciation of the importance of the justices' various votes.

But these weaknesses should not be overstated. Outcomes may be a rather “crude measure” of the Court’s decisional output,<sup>92</sup> but they can still tell us a great deal about patterns of judicial behavior. After all, the outcome a justice supports in a given case is often the single most revealing piece of information about her views on the issue. Moreover, focusing on outcomes allows us to record the justices’ positions quite objectively, reducing the potential for bias in our data collection. Of course, outcome-based studies cannot answer all of the interesting questions we have about judicial decisionmaking,<sup>93</sup> but they can constitute a significant part of the mix of methodological tools that shed light on the Court’s behavior.<sup>94</sup>

## B. Results

1. *October 1981 to January 2006.* From September 1981, when O'Connor was sworn in as an Associate Justice, until January 2006, when she was replaced by Justice Samuel Alito,<sup>95</sup> O'Connor participated in 236 federalism decisions, casting 250 distinct votes. Roughly twenty percent of these votes were in cases addressing the structural limits on the national government’s power. As Table 1 illustrates, O'Connor’s voting record in these cases was entirely consistent with her popular reputation as a strong supporter of the states’ independent sovereignty and autonomy: she voted to invalidate the action of the national government at roughly twice the rate of her colleagues over the course of her tenure on the Court. These differences are statistically significant at the  $P=.01$  level.<sup>96</sup>

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92. Cross, Smith & Tomarchio, *supra* note 89, at 7.

93. See Friedman, *supra* note 89, at 266.

94. See Howard Gillman, *What’s Law Got to Do with It? Judicial Behavioralists Test the “Legal Model” of Judicial Decision Making*, 26 L. & SOC. INQUIRY 465, 493–94 (2001).

95. See Members of the Supreme Court of the United States, <http://www.supremecourtus.gov/about/members.pdf> (last visited Aug. 8, 2007).

96. One might dispute exactly how much statistical significance matters with respect to the various figures presented in this study. Because the study includes the entire universe of federalism decisions during Justice O'Connor’s tenure on the Court, the differences between her voting record and the various reference groups are descriptively true, regardless of their statistical significance. But a test of statistical significance—here, a difference of proportions test—helps assure us that the difference is not simply the idiosyncratic result of the particular mix of cases that came before the Court while O'Connor was a justice.

The following formulas are used to demonstrate the statistical significance of the differences between two proportions. The standard deviation of the difference (SD) is the square root of  $((P_1 \times (1 - P_1)) \div N_1) + ((P_2 \times (1 - P_2)) \div N_2)$  where  $P_1$  is the first proportion,  $P_2$  is the second proportion,  $N_1$  is the number of trials (or votes) out of which  $P_1$



<b>Table 1</b> Proportion of votes in favor of state autonomy in federalism cases addressing the limits on the national government—October 1981 to January 2006		
	All Decisions	Non-Unanimous Decisions
Justice O'Connor	65% (N=57)	88% (N=40)
All other justices combined	35% (N=449)	45% (N=317)

The picture is quite different, however, in federalism cases involving the structural limits on state authority. During her tenure on the Court, O'Connor participated in 182 cases in which a state law was challenged on federalism grounds, yielding 193 distinct votes. As Table 2 shows, O'Connor's voting record with respect to state autonomy was essentially identical to the average voting records of her colleagues. If anything, she was slightly less protective of state autonomy than her colleagues, though these differences are not statistically significant.<sup>97</sup>

<b>Table 2</b> Proportion of votes in favor of state autonomy in federalism cases addressing the limits on state governments—October 1981 to January 2006		
	All Decisions	Non-Unanimous Decisions
Justice O'Connor	47.15% (N=193)	43.98% (N=108)
All other justices combined	47.39% (N=1,495)	45.12% (N=841)

is a proportion, and  $N_2$  is the number of trials (or votes) out of which  $P_2$  is a proportion. The Z-score for the difference equals  $(P_1 - P_2) \div SD$ . At the  $P=.05$  level of confidence (where there is a 95% chance that the difference in the proportions is not the result of random chance),  $Z=1.96$ . Thus, a Z-score of 1.96 or higher means statistical significance at the level of  $P=.05$ . At the  $P=.01$  level of confidence (where there is a 99% chance that the difference in the proportions is not the result of random chance),  $Z=2.58$ . Thus, a Z-score of 2.58 or higher means statistical significance at the  $P=.01$  level. See David S. Moore, THE BASIC PRACTICE OF STATISTICS 504–07, 521–24 (4th ed. 2007).

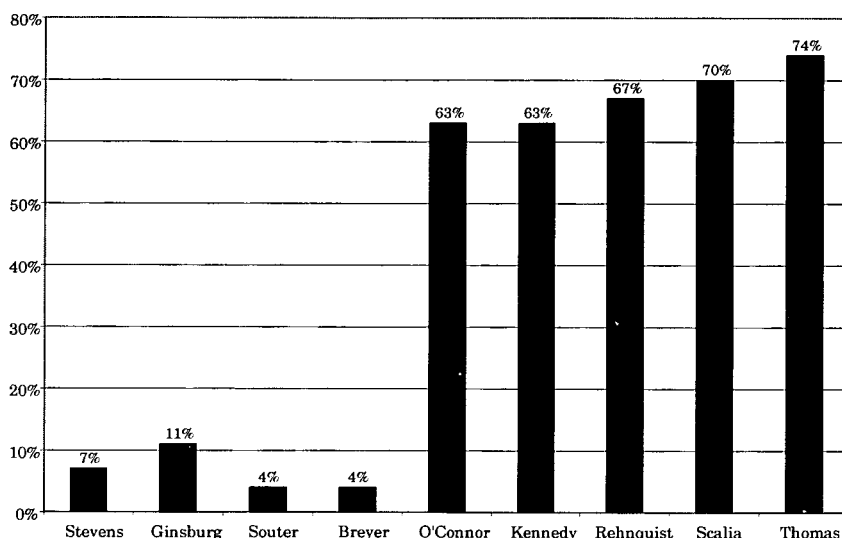
In Table 1, the Z-score for the difference in all decisions (65% versus 35%) was 4.474. The Z-score for the difference in non-unanimous decisions (88% versus 45%) was 7.355. Because both of these Z-scores exceed 1.96, the differences are statistically significant.

97. In all decisions, the Z-score for the difference (47.15% versus 47.39%) was 0.0629. In non-unanimous decisions, the Z-score for the difference (43.98% versus 45.12%) was 0.2246. Because both Z-scores fall below 1.96, the differences are not statistically significant.

2. *October 1994 to July 2005.* The same dichotomous pattern holds for O'Connor's last eleven terms on the Court, though her record in the union-preserving federalism cases is even more intriguing. From October 1994 to July 2005, the Court decided twenty-five cases involving the limits on Congress's enumerated powers, yielding twenty-seven distinct voting opportunities for the justices. As Figure 1 shows, the voting patterns in these cases conform to the common perception of the Rehnquist Court: Rehnquist, O'Connor, Scalia, Kennedy, and Thomas typically voted to invalidate the assertion of federal authority at issue, while Stevens, Souter, Ginsburg, and Breyer typically dissented.<sup>98</sup>

**Figure 1**

Proportion of votes in favor of state autonomy in federalism cases addressing the limits on the national government—all decisions, October 1994 to June 2005  
( $N=27$ )



The Court's polarization is clearer when we limit our review to its non-unanimous decisions. In these seventeen cases,

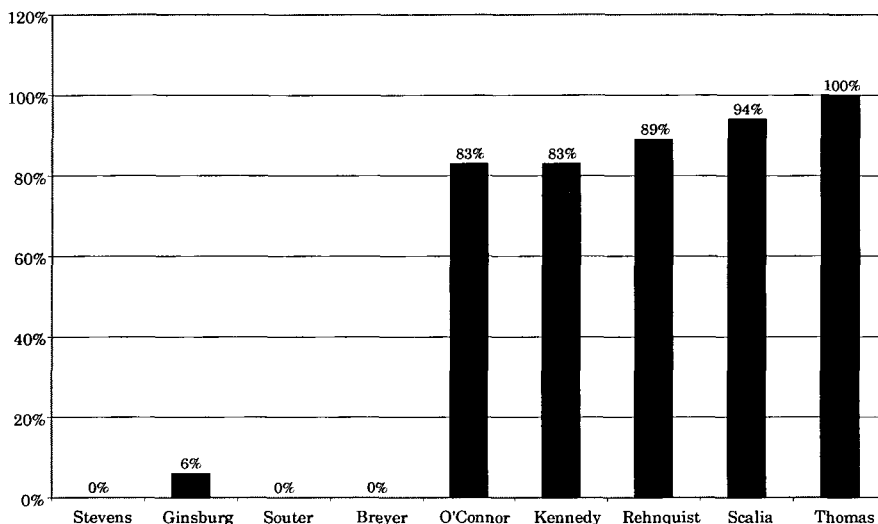
98. The differences between O'Connor's voting record in these cases and those of Stevens, Ginsburg, Souter, and Breyer are statistically significant at the  $P=.01$  level. The differences between O'Connor's voting record and those of Rehnquist, Kennedy, Scalia, and Thomas are not statistically significant. The results of the Z-score calculations are as follows: for O'Connor versus Stevens (63% versus 7%),  $Z=5.329$ ; for O'Connor versus Ginsburg (63% versus 11%),  $Z=4.697$ ; for O'Connor versus Souter (63% versus 4%),  $Z=5.8847$ ; for O'Connor versus Breyer (63% versus 4%),  $Z=5.8847$ ; for O'Connor versus Rehnquist (63% versus 67%),  $Z=0.3084$ ; for O'Connor versus Scalia (63% versus 70%),  $Z=0.5464$ ; and for O'Connor versus Thomas (63% versus 74%),  $Z=0.8868$ . There was no statistically significant difference between O'Connor and Kennedy (63% versus 63%) because there was no difference.

yielding eighteen votes per justice, the Court almost always split 5–4 along the same lines. Justice O'Connor's record in these cases substantiates her reputation as a strong proponent of state autonomy. Over these eleven terms, there were only three non-unanimous decisions in which O'Connor voted to uphold the exercise of federal authority: *Nevada v. Hibbs*, *Tennessee v. Lane*, and *Tennessee Student Assistance Corp. v. Hood*.<sup>99</sup>

**Figure 2**

Proportion of votes in favor of state autonomy in federalism cases addressing the limits on the national government—non-unanimous decisions, October 1994 to June 2005

(*N*=18)



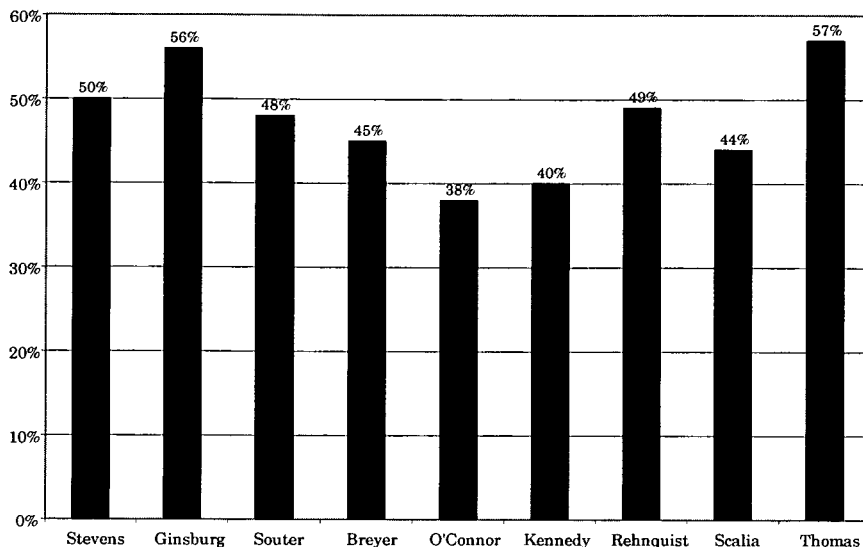
Again, O'Connor's record was quite different in cases addressing the federalism-based limits on the states. Over the same time period, the Court decided fifty-five cases involving the constitutional provisions constraining state power, yielding fifty-eight distinct votes. In these cases, Justice O'Connor was hardly sympathetic to the

99. Again, O'Connor's differences from Stevens, Ginsburg, Souter, and Breyer are statistically significant at the  $P=.01$  level, while her differences from Rehnquist, Kennedy, Scalia, and Thomas are not statistically significant. The results of the Z-score calculations are as follows: for O'Connor versus Stevens (83% versus 0%),  $Z=9.3746$ ; for O'Connor versus Ginsburg (83% versus 6%),  $Z=7.3506$ ; for O'Connor versus Souter (83% versus 0%),  $Z=9.3746$ ; for O'Connor versus Breyer (83% versus 0%),  $Z=9.3746$ ; for O'Connor versus Rehnquist (83% versus 89%),  $Z=0.5207$ ; for O'Connor versus Scalia (83% versus 94%),  $Z=1.0501$ ; and for O'Connor versus Thomas (83% versus 100%),  $Z=1.9201$ . Again, there was no statistically significant difference between O'Connor and Kennedy (83% versus 83%) because there was no difference.

states' policy initiatives. Indeed, she was the justice who voted least frequently to sustain the assertion of state authority.<sup>100</sup>

**Figure 3**

Proportion of votes in favor of state autonomy in federalism cases addressing the limits on state governments—all decisions, October 1994 to June 2005  
(*N*=58)



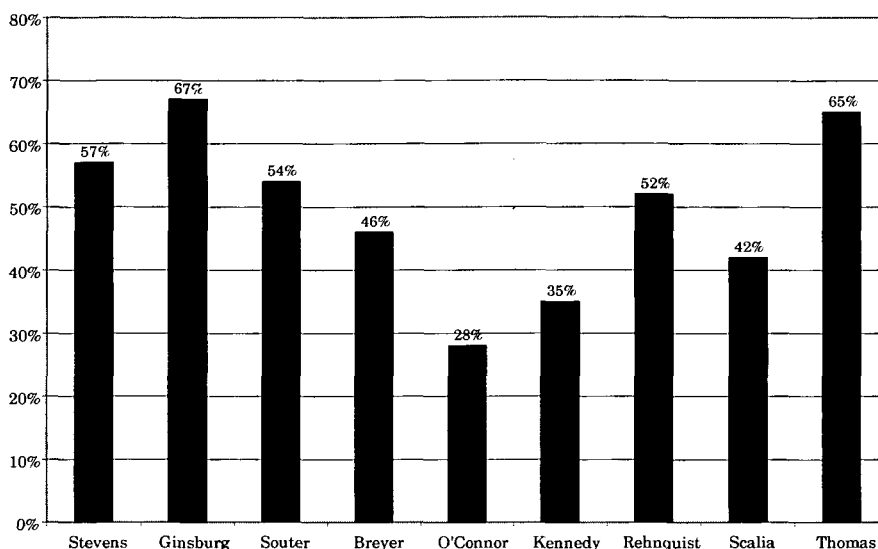
O'Connor's relative indifference to state autonomy in this context is clearer when we isolate the Court's non-unanimous decisions. In the twenty-seven cases between October 1994 and June 2005 in which the Court disagreed over the application of a federalism-based limit on the states, O'Connor cast only 7.5 votes (twenty-eight percent) to uphold the challenged state law. This was the lowest rate on the Court.<sup>101</sup>

100. The resulting Z-score calculations are as follows: for O'Connor versus Stevens (38% versus 50%),  $Z=1.3115$ ; for O'Connor versus Ginsburg (38% versus 56%),  $Z=1.9745$ ; for O'Connor versus Souter (38% versus 48%),  $Z=1.0934$ ; for O'Connor versus Breyer (38% versus 45%),  $Z=0.7670$ ; for O'Connor versus Kennedy (38% versus 40%),  $Z=0.2209$ ; for O'Connor versus Rehnquist (38% versus 49%),  $Z=1.2023$ ; for O'Connor versus Scalia (38% versus 44%),  $Z=0.6582$ ; and for O'Connor versus Thomas (38% versus 57%),  $Z=2.0870$ . Only O'Connor's differences from Ginsburg and Thomas are statistically significant at the  $P=.05$  level.

101. The differences between O'Connor's voting record in these cases and those of Stevens, Ginsburg, Souter, and Thomas are statistically significant at the  $P=.05$  level. The differences between her voting record and those of Rehnquist, Breyer, Scalia, and Kennedy are not statistically significant. The Z-score calculations are as follows: for O'Connor versus Stevens (28% versus 57%),  $Z=2.2545$ ; for O'Connor versus Ginsburg

**Figure 4**

Proportion of votes in favor of state autonomy in federalism cases addressing the limits on state governments—non-unanimous decisions, October 1994 to June 2005  
(N=27)



## V. DISCUSSION

In her first public address after announcing her retirement, Justice O'Connor said that she viewed the states as "laboratories": we should "[l]et them try things and see how it works."<sup>102</sup> The sentiment is one commonly associated with O'Connor, but it is not one that she consistently expressed in her voting record as a justice, at least in cases directly presenting federalism questions. To be sure, O'Connor consistently voted for results that protected state prerogatives in cases implicating the structural limits on the national government.<sup>103</sup> But in cases

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(28% versus 67%),  $Z=3.1170$ ; for O'Connor versus Souter (28% versus 54%),  $Z=2.0139$ ; for O'Connor versus Breyer (28% versus 46%),  $Z=1.3943$ ; for O'Connor versus Kennedy (28% versus 35%),  $Z=0.5552$ ; for O'Connor versus Rehnquist (28% versus 52%),  $Z=1.8565$ ; for O'Connor versus Scalia (28% versus 42%),  $Z=1.0903$ ; and for O'Connor versus Thomas (28% versus 65%),  $Z=2.9349$ .

102. Ralph Thomas, *Retiring Justice Worries About Loss of States' Rights*, SEATTLE TIMES, July 22, 2005, at A4.

103. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001); *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (holding that Congress exceeded its Commerce Clause authority with the Gun-Free School Zones Act). See also *supra* note 21 and accompanying text (discussing the issue of federal encroachment on state sovereignty).

involving the Constitution's union-preserving federalism provisions—its structural limits on the states—she was no more inclined to “let them try things” than the average justice with whom she served.

If O'Connor was not quite the ardent proponent of state autonomy that many have presumed, are there alternative descriptions that capture her behavior in federalism cases? Developing a full-blown theory of O'Connor's approach to federalism goes beyond the scope of this Article. But let me at least suggest a line of inquiry—one that would be fully consistent with the priorities of the Republican Party of the late twentieth century that propelled O'Connor onto the Court.<sup>104</sup>

Instead of simply seeing federalism cases as presenting a choice between more or less state autonomy, we might alternatively conceptualize them as presenting choices about the extent of government regulation generally. Whether they involve the breadth of Congress's enumerated powers or the union-preserving limits on the states, at stake are limits on the government's power to regulate. Of course, when the Court holds that a state law has been preempted—and even when it concludes that a state law violates the Dormant Commerce Clause—federal regulation of the same activity usually remains in place.<sup>105</sup> But a judgment invalidating the state law necessarily reduces the aggregate level and stringency of the regulation of that activity. In other words, every federalism case presents some version of a choice between more or less regulation.

From this perspective, we can derive an alternative characterization of O'Connor's voting record in federalism cases: a general disposition towards reducing government regulation, regardless of its source.<sup>106</sup> Consider again Justice O'Connor's 148 votes in non-unanimous federalism cases over her twenty-four-

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104. Cross, Smith, & Tomarchio, *supra* note 89, at 3 (observing that, during his 1980 presidential election campaign, Ronald Reagan strongly criticized the liberal decisions of the Warren Court, arguing “that the judiciary had lost its grounding in originalism and restraint,” and that, following his election, he was committed to appointing conservative judges).

105. See, e.g., *Edgar v. MITE Corp.*, 457 U.S. 624, 645–46 (1982) (invalidating an Illinois state law because of the burden on interstate commerce, but promoting the Williams Act, a federal law regulating similar activity to a lesser degree).

106. Others, such as Frank Cross and Richard Fallon—taking a bluntly political view of the Rehnquist Court's behavior—have attributed the deregulatory valence to aspects of the Court's federalism project. See Cross, *supra* note 1, at 1322–24 (describing the deregulatory nature of the Rehnquist Court's 1999 federalism decisions that limited the legislative authority of Congress); Fallon, *supra* note 14, at 470–71 (positing that “the substantive conservatism of Justices O'Connor and Kennedy” may well lead “them to view the Commerce Clause as embodying antiregulatory, procompetitive ideals”).

plus terms on the Court: sixty-three percent of those votes favored a reduction in government regulation, while the average among the other justices sitting in the same cases was fifty-two percent. Thus, her distance from the average voting record of the other justices was the same along the dimensions of greater state autonomy and less government regulation—she voted for outcomes that enhanced state autonomy, as well as those that reduced the stringency of government regulation, at a rate eleven percent higher than her colleagues.<sup>107</sup>

<b>Table 3</b> Proportion of votes in favor of state autonomy in federalism cases addressing the limits on the national government—October 1981 to January 2006		
	Votes to invalidate regulation	Votes in favor of state autonomy
Justice O'Connor (N=148)	63%	56%
All other justices combined (N=1,158)	52%	45%

The deregulatory nature of O'Connor's voting record in federalism cases was especially pronounced in her last eleven full terms on the Court. She cast more than three-fourths of her votes in non-unanimous decisions during these terms to invalidate the regulation at issue, whether the regulation emanated from the federal government or the states.<sup>108</sup> For this period, O'Connor's voting record was the single most hostile on the Court to government regulation in federalism cases.<sup>109</sup>

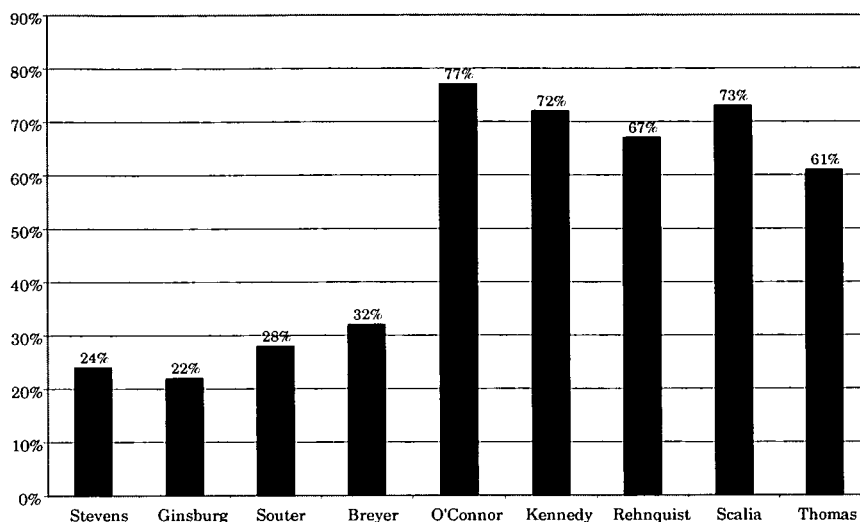
107. Both of these differences of 11% are statistically significant at the  $P=.05$  level. For the difference between O'Connor and all other justices in the rate of voting to invalidate the regulation at issue (63% versus 52%),  $Z=2.599$ . For the difference between O'Connor and all other justices in the rate of voting for the result favoring state autonomy (56% versus 45%),  $Z=2.538$ .

108. See, e.g., *Lorrillard Tobacco Co. v. Reilly*, 533 U.S. 525, 551 (2001).

109. O'Connor's difference from Stevens, Ginsburg, Souter, and Breyer are statistically significant at the  $P=.05$  level, while the remaining differences are not. The Z-scores are as follows: for O'Connor versus Stevens (77% versus 24%),  $Z=5.9297$ ; for O'Connor versus Ginsburg (77% versus 22%),  $Z=6.2479$ ; for O'Connor versus Souter (77% versus 28%),  $Z=5.3412$ ; for O'Connor versus Breyer (77% versus 32%),  $Z=4.8048$ ; for O'Connor versus Kennedy (77% versus 72%),  $Z=0.5450$ ; for O'Connor versus Rehnquist (77% versus 67%),  $Z=1.0630$ ; for O'Connor versus Scalia (77% versus 73%),  $Z=0.4386$ ; and for O'Connor versus Thomas (77% versus 61%),  $Z=1.6661$ .

**Figure 5**

Proportion of votes in favor of reducing regulation or regulatory authority in federalism cases combined—non-unanimous decisions, October 1994 to June 2005  
(*N*=45)



Another way to explore the question is to confine our review to those federalism decisions addressing the legality of laws, regulations, or common law liability rules imposed on private businesses. Because Congress's authority to regulate economic or commercial activity is essentially unquestioned, these decisions all involved the legality of state or local regulations.<sup>110</sup> As a result, each decision in this category presented a choice between an outcome favoring state policymaking autonomy and an outcome favoring less stringent regulation of private business. And these cases reveal the same basic pattern. Over the course of her entire career, Justice O'Connor voted for the outcome favoring state autonomy (45.9%, *N*=159) at a rate slightly lower than that of her colleagues (49.2%, *N*=1,231), though this difference is not statistically significant. And over her last eleven

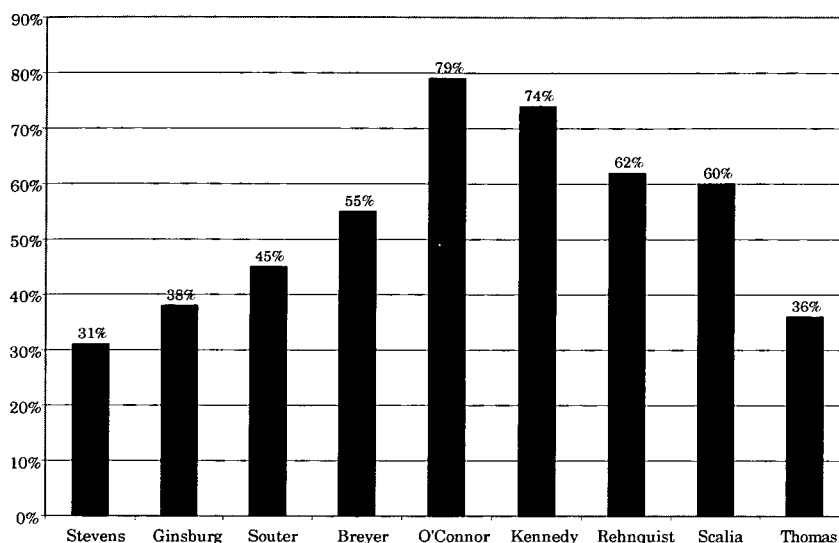
110. See, e.g., *Cook v. Gralike*, 531 U.S. 510, 526–27 (2001) (holding Article VIII of Missouri's Constitution regarding election term limits unconstitutional); *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 290–91 (1998) (holding a New York law in violation of the Privileges and Immunities Clause of the U.S. Constitution).



full terms on the Court, she voted for the outcome favoring state autonomy less frequently than any other justice.<sup>111</sup>

**Figure 6**

Proportion of votes in favor of reducing regulation in non-unanimous federalism decisions involving the legality of regulations imposed on private businesses—October 1994 to June 2005  
(N=21)



Again, these data do not support the causal inference that O'Connor voted as she did *because* of a preference to reduce government regulation. A number of other variables might have influenced her behavior in federalism cases: her responsiveness to the position taken by the Solicitor General; her sense of public opinion or the preferences of Congress, the President, or lower court judges; her situational relationship with her colleagues and her role in their group dynamic; or her policy preferences along dimensions other than state autonomy or business regulation.<sup>112</sup>

111. The differences between O'Connor's voting record on this score and those of Stevens, Thomas, Ginsburg, and Souter, are statistically significant at the  $P=.05$  level. The remaining differences are not. The Z-score computations are as follows: for O'Connor versus Stevens (79% versus 31%),  $Z=3.5692$ ; for O'Connor versus Ginsburg (79% versus 38%),  $Z=2.9652$ ; for O'Connor versus Souter (79% versus 45%),  $Z=2.4233$ ; for O'Connor versus Breyer (79% versus 55%),  $Z=1.7105$ ; for O'Connor versus Kennedy (79% versus 74%),  $Z=0.3828$ ; for O'Connor versus Rehnquist (79% versus 62%),  $Z=1.2295$ ; for O'Connor versus Scalia (79% versus 60%),  $Z=1.3666$ ; and for O'Connor versus Thomas (79% versus 36%),  $Z=3.1302$ .

112. These characteristics have been discussed by several authors. See, e.g., M. David Gelfand & Keith Werhan, *Federalism and Separation of Powers on a "Conservative"*

Testing the significance of such influences would require a multiple regression that incorporated, to the extent feasible, each of these variables and perhaps others.

Still, the data presented here are revealing in two important ways. First, O'Connor's tendency to support state autonomy—though greater than the average justice—was only evident in cases involving the limits on the federal government; she was no more protective of state autonomy than the average of her colleagues in cases involving the structural limits on the states. Second, in the full run of federalism cases, O'Connor voted as frequently to reduce regulation or regulatory authority as she did to enhance state policymaking autonomy, and she did so much more frequently over her last eleven full terms on the Court. This was especially true in cases presenting a dichotomous choice between an outcome that enhanced state autonomy and one that reduced government regulation.

## VI. CONCLUSION

In his pathbreaking 1957 article *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, Robert Dahl wrote that “the policy views dominant on the [Supreme] Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.”<sup>113</sup> More recently, a number of political scientists have extended and refined Dahl's thesis, forming a school of thought commonly known as the “regime politics” approach to judicial behavior. The basic theory—advanced by such scholars as Mark Graber, Howard Gillman, Cornell Clayton, Mitch Pickerill, Keith Whittington, and Terri Peretti—is that the Court's power and substantive views are deliberately constructed by the dominant national political coalition.<sup>114</sup> Though the Court certainly

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*Court: Currents and Cross-Currents from Justices O'Connor and Scalia*, 64 TUL. L. REV. 1443, 1475 (1990) (suggesting that O'Connor's “functionalist approach” and her history as a legislator led to “more deferential and less activist judicial decision[s]”); Tracey E. George, *Judicial Independence and the Ambiguity of Article III Protections*, 64 OHIO ST. L.J. 221, 228–29 (2003) (suggesting that O'Connor with President Reagan might have been defined on the basis of her ideology, including her position on issues such as abortion); Merrill *supra* note 2, at 576, 629–30, 636–37 (reporting that “Court watchers have long suggested that [Justices O'Connor and Kennedy] are the most sensitive to external forces,” such as public opinion); Mary Massaron Ross & Mary R. Vasaly, *Recent Developments in Appellate Law*, 41 TORT TRIAL & INS. PRAC. L.J. 181, 187–90 (2006) (“Justice O'Connor's state legislative background . . . made her a strong proponent of federalism.”).

113. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

114. See Thomas M. Keck, *Party Politics or Judicial Independence? The Regime*

exercises independent judgment on a case-by-case basis, its general ideological direction is shaped by political developments external to the Court. Constitutional development is more the product of shifts in the governing national coalition than the occasion of the justices finally being won over by particular legal arguments. Thus, the Court is best conceived as an integral policymaking partner of the ascendant political majority, or at least as an influential segment of that majority.<sup>115</sup>

Regime politics theory is probably better suited to explain the behavior of the Court as a whole than the actions of a single justice. But Justice O'Connor's voting record in federalism cases certainly appears to resemble the political priorities of the conservative movement that gave rise to her career. While the Republican Party of the last thirty years has often emphasized the importance of the independent sovereignty of the states, it has generally done so by advocating for enforcement of the structural limits on Congress's authority and for a reduction of the size of the federal government.<sup>116</sup> To be sure, GOP thought on the subject has not been monolithic, and those genuinely committed to state autonomy have achieved some policy successes, such as the Unfunded Mandates Reform Act of 1995.<sup>117</sup> But the modern Republican Party as a whole has never embraced a broader constitutional program to substantially enhance the legislative autonomy of the states.<sup>118</sup> This seems especially true in

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*Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511, 511, 515–19 (2007) (book review) (identifying contemporary political scientists studying regime politics in order to understand the influence of majority power on judicial behavior).

115. There are two principal mechanisms by which this might occur. First, the President and the Senate select justices based largely on their ideology, ensuring that the justices' substantive views will tend to reflect those of the dominant coalition at the time of their nominations. Second, regardless of the views that they take to the bench, the Court as an institution is substantially constrained by the preferences of the contemporary Congress and President. Without the sword or the purse, the justices must be cognizant—consciously or unconsciously—of the views of the extant political regime in making their decisions. Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131, 138 (“Lacking the powers of purse and sword, the Supreme Court must make sure that its decisions are acceptable to the American people and their elected officials. Otherwise, the Court risks a political backlash—one that will almost certainly undo any doctrinal innovations that it might pursue.”).

116. See Pickerill & Clayton, *supra* note 14, at 236–39 (discussing the Republican Party's federalism initiatives since the 1960s).

117. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104–4, 109 Stat. 48 (1995) (codified at 2 U.S.C. §§ 1501–1538, 1571 (2000)).

118. For instance, consider such Republican-sponsored initiatives as the Defense of Marriage Act, Pub. L. No. 104–199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738(c) (2000)) (ensuring that no requirement exists for a state to give effect to the same sex relationships legitimized under the laws of another state); No Child Left Behind Act of 2001, Pub. L. No. 107–110, 115 Stat. 1425 (2002) (codified as amended at 20 U.S.C. §§ 6301 et seq. (2006)) (establishing federal law with respect to the administration

the area of commercial regulation. Consider such GOP initiatives as the decades-long effort to enact federal tort reform legislation, recently resulting in the Class Action Fairness Act;<sup>119</sup> the inclusion of express preemption clauses in numerous Republican-sponsored statutes;<sup>120</sup> and the use of agency rulemaking by the present Bush Administration to preempt wide swaths of state law,<sup>121</sup> just to name a few.

Justice O'Connor plainly cared about federalism, and she believed strongly in the judicial enforcement of the structural limits on the national government. But, more generally, her voting record in cases involving the federalism-based constraints on state governments did not reveal a particular concern for state policymaking autonomy. Like the political coalition that placed her on the Court—or at least an influential aspect of that coalition—she tended to favor outcomes that enhanced state autonomy but to no greater degree than she favored outcomes that reduced the stringency of government regulation. In this way, she appears to have reflected the priorities of the modern Republican Party. Given O'Connor's place as the median justice on a Republican-dominated Court, this is entirely unsurprising.

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of elementary and secondary school education); the effort to intervene in the Terri Schiavo saga, An Act For the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109–3, 119 Stat. 15, 15 (2005) (removing jurisdiction from Florida state courts and providing federal court standing to parents of Schiavo against anyone withholding food or medical treatment necessary to sustain her life); and the Department of Justice's attempts to undercut California's legalization of medical marijuana in *Gonzales v. Raich*, 545 U.S. 1, 6–9 (2005), and Oregon's legalization of physician-assisted suicide in *Gonzales v. Oregon*, 546 U.S. 243, 251–55 (2006).

119. Class Action Fairness Act of 2005, Pub. L. No. 109–2, 119 Stat. 4, 5 (codified as note to 28 U.S.C. § 1711 (2006)).

120. See, e.g., Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 594, 685–86 (codified as amended at 15 U.S.C. §§ 717 et seq. (2006)) (preempting various state environmental protections); Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108–159, 117 Stat. 1952, 1961, 1972–73 (codified as amended at 15 U.S.C. §§ 1681 et seq. (2006)) (preempting some state credit reporting and identity theft laws); CANSPAM Act of 2003, Pub. L. 108–187, 117 Stat. 2699, 2716 (codified at 15 U.S.C. §§ 7702 et seq. (2006)) (preempting state laws regulating unsolicited e-mail spam); Department of Defense Appropriations Act, Pub. L. No. 109–148, 119 Stat. 2680, 2827 (2005) (to be codified at 42 U.S.C. §§ 247d–6d) (preempting state tort law with respect to injuries from certain drugs and vaccines); Protection of Lawful Commerce in Arms Act, Pub. L. No. 109–92, 119 Stat. 2095, 2096 (2005) (to be codified at 15 U.S.C. §§ 7901 et seq.) (preempting state authority to file civil actions against gun manufacturers).

121. See Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 227–29 (2007) (discussing efforts to preempt state laws through rulemaking by the Food and Drug Administration, the Consumer Products Safety Commission, and the National Highway and Transportation Safety Administration); see also Stephen Labaton, 'Silent Tort Reform' Is Overriding States' Powers, N.Y. TIMES, Mar. 10, 2006, at C5 ("Using a variety of largely unheralded regulations, officials appointed by President Bush have moved in recent months to neuter the states.").

### Appendix

The following is a list of all the cases that were included in the study, sorted by subject matter, and presented in reverse chronological order.

#### DECISIONS ADDRESSING THE LIMITS ON THE NATIONAL GOVERNMENT

##### *Commerce Clause*

- Gonzalez v. Raich, 545 U.S. 1 (2005)
- Guillen v. Pierce County, 537 U.S. 129 (2005)
- United States v. Morrison, 529 U.S. 598 (2000)
- Reno v. Condon, 528 U.S. 141 (2000)
- United States v. Lopez, 514 U.S. 549 (1995)

##### *Tenth Amendment*

- Reno v. Condon, 528 U.S. 141 (2000)
- Printz v. United States, 521 U.S. 898 (1997)
- New York v. United States, 505 U.S. 144 (1992)
- South Carolina v. Baker, 485 U.S. 505 (1988)
- Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)
- Bell v. New Jersey, 461 U.S. 773 (1983)
- EEOC v. Wyoming, 460 U.S. 226 (1983)
- FERC v. Mississippi, 456 U.S. 742 (1982)
- United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982)

##### *Spending Clause*

- Sabri v. United States, 541 U.S. 600 (2004)
- South Dakota v. Dole, 483 U.S. 203 (1987)

##### *Section Five of the Fourteenth Amendment*

- United States v. Georgia, 546 U.S. 151 (2006)
- Tennessee v. Lane, 541 U.S. 509 (2004)
- Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003)
- Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002)
- Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001)
- Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000)
- Alden v. Maine, 527 U.S. 706 (1999)

Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999)

Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999)

Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996)

United States v. Morrison, 529 U.S. 598 (2000)

City of Boerne v. Flores, 521 U.S. 507 (1997)

*Eleventh Amendment*

Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 (2004)

Frew v. Hawkins, 540 U.S. 431 (2004)

Lapides v. Bd. of Regents of Univ. Sys. of Ga., 535 U.S. 613 (2002)

Raygor v. Regents of Univ. of Minn., 534 U.S. 533 (2002)

California v. Deep Sea Research, Inc., 523 U.S. 491 (1998)

Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997)

Regents of Univ. of Cal. v. Doe, 519 U.S. 425 (1997)

Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994)

P.R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993)

Hafer v. Melo, 502 U.S. 21 (1991)

Blatchford v. Native Vill. of Notak, 501 U.S. 775 (1991)

McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990)

Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990)

Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96 (1989)

Missouri v. Jenkins, 491 U.S. 274 (1989)

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)

Dellmuth v. Muth, 491 U.S. 223 (1989)

Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987)

Papasan v. Allain, 478 U.S. 265 (1986)

Green v. Mansour, 474 U.S. 64 (1985)

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985)

Oneida County v. Oneida Indian Nation, 470 U.S. 226 (1985)

Pennhurst State Sch. & Hosp. v. Halderma, 465 U.S. 89 (1984)

Arizona v. California, 460 U.S. 605 (1983)

Colorado v. New Mexico, 459 U.S. 176 (1982)

Fla. Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982)

Patsy v. Bd. of Regents of State of Fla., 457 U.S. 496 (1982)

Cory v. White, 457 U.S. 85 (1982)

*Bankruptcy Clause*

Cent. Va. Comm. Coll. v. Katz, 546 U.S. 356 (2006)

DECISIONS ADDRESSING THE UNION-PRESERVING LIMITS ON THE STATES

*Preemption*

Mid-Con Freight Sys., Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 440 (2005)

Bates v. Dow Agrosciences L.L.C., 544 U.S. 431 (2005)

Aetna Health Inc. v. Davila, 542 U.S. 200 (2004)

Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004)

Nixon v. Mo. Mun. League, 541 U.S. 125 (2004)

Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003)

Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39 (2003)

Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003)

Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003)

Ky. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003)

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002)

City of Columbus v. Ours Garage & Wrecking Serv., Inc., 536 U.S. 424 (2002)

Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355 (2002)

Wis. Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473 (2002)

Chao v. Mallard Bay Drilling, Inc., 534 U.S. 235 (2002)

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)  
Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141 (2001)  
Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001)  
Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000)  
Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000)  
Norfolk S. Ry. v. Shanklin, 529 U.S. 344 (2000)  
United States v. Locke, 529 U.S. 89 (2000)  
Unum Life Ins. Co. of Am. v. Ward, 526 U.S. 358 (1999)  
El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999)  
Foster v. Love, 522 U.S. 67 (1997)  
Johnson v. Fankell, 520 U.S. 911 (1997)  
Boggs v. Boggs, 520 U.S. 833 (1997)  
De Buono v. NYSA-ILA Med. & Clinical Servs. Found., 520 U.S. 806 (1997)  
Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316 (1997)  
Atherton v. FDIC, 519 U.S. 213 (1997)  
Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)  
Smiley v. Citibank (S.D.), N.A., 517 U.S. 735 (1996)  
Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996)  
Barnett Bank, N.A. v. Nelson, 517 U.S. 25 (1996)  
Yamaha Motor Corp., N.A., U.S.A. v. Calhoun, 516 U.S. 199 (1996)  
Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995)  
N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995)  
Freightliner Corp. v. Myrick, 514 U.S. 280 (1995)  
Anderson v. Edwards, 514 U.S. 143 (1995)  
Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)  
Am. Airlines, Inc. v. Wolens, 513 U.S. 219 (1995)  
Neb. Dep't of Revenue v. Loewenstein, 513 U.S. 123 (1994)  
Dep't of Taxation and Fin. of N.Y. v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994)  
Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994)



Livadas v. Bradshaw, 512 U.S. 107 (1994)  
Am. Dredging Co. v. Miller, 510 U.S. 443 (1994)  
Dep't of Revenue of Ore. v. ACF Indus., 510 U.S. 332 (1994)  
U.S. Dep't of Treasury v. Fabe, 508 U.S. 491 (1993)  
CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993)  
Bldg. & Constr. Trades Council v. Assoc. Builders & Contractors, 507 U.S. 218 (1993)  
Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60 (1993)  
District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125 (1992)  
Cipollone v. Liggett Group, 505 U.S. 504 (1992)  
Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992)  
Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992)  
Arkansas v. Oklahoma, 503 U.S. 91 (1992)  
Wisc. Pub. Intervenor v. Mortier, 501 U.S. 597 (1991)  
Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990)  
FMC Corp. v. Holliday, 498 U.S. 52 (1990)  
Miles v. Apex Marine Corp., 498 U.S. 19 (1990)  
English v. Gen. Elec. Co., 496 U.S. 72 (1990)  
California v. FERC, 495 U.S. 490 (1990)  
North Dakota v. United States, 495 U.S. 423 (1990)  
United Steelworkers of Am. v. Rawson, 495 U.S. 362 (1990)  
Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989)  
Massachusetts v. Morash, 490 U.S. 107 (1989)  
Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493 (1989)  
Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989)  
Shell Oil Co. v. Iowa Dep't of Revenue, 488 U.S. 19 (1988)  
Boyle v. United Techs. Corp., 487 U.S. 500 (1988)  
Miss. Power & Light Co. v. Mississippi, 487 U.S. 354 (1988)  
Felder v. Casey, 487 U.S. 131 (1988)

- Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988)
- Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988)
- New York v. FCC, 486 U.S. 57 (1988)
- Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988)
- Perry v. Thomas, 482 U.S. 483 (1987)
- Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987)
- Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987)
- Int'l Bhd. of Elec. Workers v. Hechler, 481 U.S. 851 (1987)
- Rose v. Rose, 481 U.S. 619 (1987)
- CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987)
- Metro. Life Ins. Co. v. Taylor, 481 U.S. 58 (1987)
- Pilot Life Ins. Co v. Dedeaux, 481 U.S. 41 (1987)
- Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987)
- California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)
- Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987)
- 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987)
- Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987)
- R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130 (1986)
- Baker v. Gen. Motors Corp., 478 U.S. 621 (1986)
- Offshore Logistics, Inc. v. Tellentire, 477 U.S. 207 (1986)
- Wardair Canada, Inc. v. Fla. Dep't of Revenue, 477 U.S. 1 (1986)
- Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986)
- Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877 (1986)
- Int'l Longshoremen's Assoc. v. Davis, 476 U.S. 380 (1986)
- Golden State Transit Corp. v. Los Angeles, 475 U.S. 608 (1986)
- Exxon Corp. v. Hunt, 475 U.S. 355 (1986)

Wis. Dep't of Indus., Labor and Human Relations v. Gould, 475 U.S. 282 (1986)

Fisher v. Berkeley, 475 U.S. 260 (1986)

Transcon. Gas Pipe Line Corp. v. State Oil & Gas Bd. of Miss., 474 U.S. 409 (1986)

Midatlantic Nat'l Bank v. N.J. Dep't of Env'tl. Prot., 474 U.S. 494 (1986)

Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)

Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707 (1985)

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985)

Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256 (1985)

Brown v. Hotel & Rest. Employees & Bartenders Int'l Union, 468 U.S. 491 (1984)

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)

Hayfield N. R.R. v. Chi. & N. W. Transp., 467 U.S. 622 (1984)

Mich. Cannery & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461 (1984)

Southland Corp. v. Keating, 465 U.S. 1 (1984)

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)

Aloha Airlines, Inc. v. Dir. of Taxation of Haw., 464 U.S. 7 (1983)

Rice v. Rehner, 463 U.S. 713 (1983)

Belknap, Inc. v. Hale, 463 U.S. 491 (1983)

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)

Philko Aviation, Inc. v. Shacket, 462 U.S. 406 (1983)

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983)

Exxon Corp v. Eagerton, 462 U.S. 176 (1983)

Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375 (1983)

Pac. Gas & Elec. Co v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983)

Local 926, Int'l Union of Operating Eng'rs v. Jones, 460 U.S. 669 (1983)

Xerox Corp. v. County of Harris, 459 U.S. 145 (1982)  
Ramah Navaho Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832 (1982)  
Rice v. Norman Williams Co., 458 U.S. 654 (1982)  
Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141 (1982)

*Dormant Commerce Clause*

Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429 (2005)  
Granholm v. Heald, 544 U.S. 460 (2005)  
Hillside Dairy, Inc. v. Lyons, 539 U.S. 59 (2003)  
Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003)  
Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal., 528 U.S. 458 (2000)  
S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999)  
Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997)  
Gen. Motors Corp. v. Tracy, 519 U.S. 278 (1997)  
Fulton Corp. v. Faulkner, 516 U.S. 325 (1996)  
Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995)  
Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175 (1995)  
Barclays Bank PLC v. Francise Tax Bd. of Cal., 512 U.S. 298 (1994)  
W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994)  
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C & A Carbone v. Town of Clarkstown, 511 U.S. 383 (1994)  
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